Supreme Court, U.S.
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IN THE

Supreme Court of the United States

October Term, 1993

CARL V. LAMB,

Petitioner,

vs.

UNION CARBIDE CORPORATION,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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STATEMENT OF QUESTIONS PRESENTED FOR REVIEW

1. On an issue of slander *per se*, where defendant's employee denied that he said anything, where that fact was opposed by third party recipient, may subsequent claim of qualified privilege defeat petitioner's Seventh Amendment right to jury trial on issues of malice, excess of privilege, and credibility?

2. On an issue of libel, where published article contained material that was libelous towards persons who were terminated, and where article was posted on bulletin board on floor of building where petitioner worked, and petitioner was the only person terminated, may petitioner's constitutional right to jury trial be violated by finding that article did not refer to him?

3. On issue of tortious interference in contract, where petitioner has made *prima facie* case, may award of summary judgment for defendant violate petitioner's constitutional right to a trial by jury?

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STATEMENT OF JURISDICTION AND GROUNDS

The Court has jurisdiction under Article II, Section 2, of the Constitution of the United States and Section 1254 of Title 28 of the United States Code, 28 U.S.C. §1254.

STATEMENT OF CONSTITUTIONAL PROVISIONS

AMENDMENT VII [1791]

> In suits at common law, where the value in controversy shall exceed twenty dollars, the right to trial by jury shall be preserved, and no fact tried by jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.

STATEMENT OF THE CASE

This petition comes as the result of a slander, libel, and tortious interference in contract claim, wherein petitioner alleged that in the process of improperly terminating him from his employment the defendant also defamed him. The claim arose from the following events:

Petitioner, Carl V. Lamb, a mechanical engineer and an employee of Midwest Technical, Inc. (MTI), was assigned to work beginning January 13, 1986, at the defendant Union Carbide Corporation site in South Charleston, West Virginia, under defendant's employee G. R. Hattiangadi, a group leader in the Plant Engineering Department. Four months later, Hattiangadi's supervisor, Joe Dodd, Manager of Plant Engineering, instructed Hattiangadi to notify all departments that petitioner would review all HVAC work[1] that was performed anywhere in the facility. After six months petitioner was assigned to work under A.B. Williamson, who also reported to Joe Dodd.

Late in 1989, Henry Williams, another MTI employee, asked petitioner to meet with an operating department engineer to review a proposed fan installation. Petitioner advised the two that the fan was unsuitable for the application. James A. Bowyer, defendant's employee, also was present. As petitioner was leaving, Bowyer announced to petitioner, "Don't get too Goddamn cocky. I might replace you. In fact, I *will* replace you." Thereafter, Bowyer found various ways to keep petitioner aware of his hostility toward petitioner.

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[1] HVAC stands for heating, ventilating, and air conditioning. In a chemical plant, HVAC has a broader meaning than the aforementioned. It involves pneumatically transporting materials in powder form, collecting and disposing of hazardous fumes, and using various methods to clean air (scrubbers, filters, electronic air cleaners, et cetera).

One year later, the defendant announced that it was forming a Large Capital Projects Group which would be headed by Bowyer and that Bowyer would recruit staff for the group. On May 28, 1991, N.J. Mabie, a new employee of the defendant, was escorted to petitioner's on-site office. The petitioner was instructed by Mabie and his escort to show Mabie all of his work.

Petitioner immediately contacted A.B. Williamson and inquired as to the purpose of Mabie's examination of petitioner's work papers. Williamson knew only that Mabie had just been hired and that Mabie reported to Hattiangadi. Williamson asserted that he was unaware of the purpose of Mabie's visit and denied any knowledge as to who had hired Mabie.

Later that day, Mabie volunteered to petitioner his account of the details of his employment interviews with defendant's employees Bowyer and Manfred Monsour. Approximately one week later, Williamson notified petitioner that Hattiangadi's group, which now included Mabie, would handle all of petitioner's work. Williamson further informed the petitioner that he (petitioner) would be terminated at some unstipulated time in the future.

Petitioner contacted E. Bartrug, who had replaced Joe Dodd as Manager of Plant Engineering, and made the queries normal to such a situation. In the five years the petitioner had worked at the defendant's site, he had never had problems with anyone except Bowyer, and he had not responded to Bowyer's hostilities. Bartrug intimated that there had been complaints about petitioner from Hattiangadi, Williamson, and Steve Brewer, the three group leaders in the Plant Engineering Department.

Petitioner first informed Bartrug that he had always had an excellent working relationship with Hattiangadi and then further informed Bartrug that he had virtually no contact with Steve Brewer. Petitioner then stated that he was unaware of any complaints about his work performance or against him personally, and he inquired as to the nature of the complaints. When Bartrug refused to elaborate, petitioner stated that he did not believe that Williamson had ever made any such complaint. Under pressure, Bartrug admitted that this was indeed true.

Petitioner then suggested that he might like to work in the new Capital Projects Group. Bartrug informed him that this would be impossible because petitioner and Bowyer, the head of the group, did not get along. Bartrug became nervous when petitioner asked him how he had become aware of this fact. When petitioner advised Bartrug of Bowyer's threat to replace the petitioner, Bartrug became agitated and refused to face the petitioner. The petitioner charged that he was being unfairly treated and unjustly discharged from his duties; Bartrug again refused to address petitioner's complaints. When Bartrug claimed that *he* had interviewed Mabie, petitioner informed him that he knew otherwise. Petitioner related all the details concerning Mabie's hiring that he had confirmed by speaking with Mabie himself as well as with other informed parties. Since Bartrug's assertions concerning Mabie's hiring were contradictory to the facts obtained by petitioner, the petitioner abruptly ended the conversation and left Bartrug's office.

Within five minutes petitioner observed Bowyer entering Bartrug's office, which was located proximate to the petitioner's office. Approximately one hour later, Bowyer emerged from Bartrug's office and entered

Mabie's office, which was directly across the hall from that of the petitioner. When Bowyer left, Mabie informed petitioner that *he himself* would decide when he was ready to terminate petitioner. Subsequently, Mabie misinformed petitioner on several occasions as to the exact date that the petitioner's employment would be terminated. This situation, which caused the petitioner much anxiety, continued for several weeks. During this interim period, petitioner was unable to explore subsequent employment opportunities due to the indeterminate date of his termination.

On August 8, 1991, Respondent had an article published in *The Charleston Gazette,* the heading of which read "UNION CARBIDE LAYOFFS LIKELY, OFFICIAL SAYS." (Appendix p. A23, Exhibit "A").

Paragraph 7 contains the statement: "[Thad] Epps [defendant's spokesman] said the company is likely to cut its use of outside contractors and consultants, and will eliminate jobs through attrition and retirements .... [According to Epps,] 'There may well be some layoffs down the road.' "

Paragraph 10 contains the following quote attributed to Epps: "For people who feel they are good performers and are truly interested in the continued viability of their jobs, it's good news .... It's going to stengthen the corporation."

Paragraph 11 also contains a quote from Epps: "For a person who feels his performance is marginal or who feels his job is not one that is important to the overall mission of the corporation, that person might have some apprehension."

On August 9, 1991, the aforementioned article was posted in its entirety on a company bulletin board. On that very same day, Williamson informed petitioner that

he was giving petitioner two weeks notice of termination of employment. Petitioner was to inform people within the organization with whom he had work pending that Mabie would be taking over his duties. Petitioner called his employer, MTI, and could find no one who was aware of his imminent termination.

In light of the fact that the article appeared on the bulletin board the very same day that the petitioner was notified of his impending termination, and considering that many employees were discussing this article while petitioner was engaged in the process of turning over his work to Mabie, the petitioner felt embarrassed, humiliated, and disgraced. When petitioner was asked by several coworkers whether he was the only person terminated, he reluctantly admitted that he was. Petitioner observed subtle glances toward the bulletin board upon which the article was posted after he informed his coworkers of his termination.

On August 23, 1991, the petitioner's last day of work, a group of his peers assembled at a local restaurant for a dinner to be held in his honor, as was the custom with employees who were leaving. Petitioner attempted to address the group but was so overcome with humiliation that he could not do so. Petitioner could not finish the meal, so he left the restaurant and returned to the building where he had spent his last five years of employment. He was so distressed by the situation that he could not tour the building to face his coworkers and say goodbye.

In late September, 1991, petitioner was apprised by persons who were not employees of defendant that Mabie was disparaging petitioner's work in the presence of people with whom petitioner had worked. Soon thereafter, petitioner happened to see Greg Goff, an

employee of an independent contractor and former coworker, at the home of a mutual friend. When petitioner inquired if Mabie was in fact criticizing petitioner's work, Goff confirmed that this was indeed the case.

In October, 1991, petitioner filed suit in the United States District Court, Charleston, West Virginia, under Section 1332 of Title 28 of the United States Code, 28 U.S.C. §1332, seeking *compensatory damages* for slander, libel, and tortious interference in contract. *Petitioner demanded a jury trial by endorsement upon the pleadings.*

Petitioner's complaint alleged, *inter alia*:

> A. That on September 10, 1991, upon visiting the site of a control room where petitioner had performed services, defendant's employee, N.J. Mabie, in the course of his employment, made the following statement to a third party: "This must be another one of Carl Lamb's screw-ups." This remark was untrue and was defamatory. It was made without privilege and implied that petitioner was incompetent in performing his duties. This was slander *per se*.

By amendment on December 13, 1991, petitioner added the following:

> The statement was made for the sole purpose of defaming the petitioner and was not made for the purpose of protecting any interest of the defendant, nor for any other reason than causing harm to the petitioner's reputation in his field of expertise.
>
> B. That defendant libeled petitioner via the published article on August 8, 1991, and by his subsequent termination on the day after the article appeared in print.

C. That defendant's employee, J.A. Bowyer, in the course of his employment, threatened to replace petitioner. Bowyer also stated to a third party that he was "...going to get Carl Lamb." Petitioner alleged that Bowyer interfered in petitioner's contractual relationship by hiring Mabie and arranging to transfer petitioner's work away from Williamson to Hattiangadi, and that this was the proximate cause of his loss of employment.

The District Court assigned the case to Magistrate Court and petitioner *again demanded a jury trial.* The District Court granted petitioner's motion. The case proceeded to a hearing before a magistrate. The magistrate quashed petitioner's interrogatories, intimidated petitioner, and erased the record of his intimidation of petitioner. The magistrate subsequently recommended summary judgment for defendant, which petitioner strenuously objected to. The District Court, without addressing the issues raised by petitioner's portion of pretrial order, rescheduled the pretrial conference and awarded summary judgment for defendant. *No notice or memoranda accompanied the order for summary judgment to advise petitioner of a right to petition for rehearing; thus, petitioner lost his opportunity to do so.* Petitioner filed an appeal in a timely manner to the Appeals Court for the Fourth Circuit. The Appeals Court affirmed the District Court's order for summary judgment. Petitioner then filed in a timely manner a petition for rehearing and suggestion for rehearing *in banc* to the Appeals Court, citing the contradictory ruling of another Appeals Court on a similar case, and *again demanded his Seventh Amendment right to a trial by jury.* Rehearing was denied January 6, 1994, and entered on January 12, 1994. It is from this order that this petition for writ of certiorari comes before this Honorable Court.

REASONS FOR GRANTING THE WRIT

In *Celotex Corp. v. Catrett*, 477 U.S. 317, the Supreme Court held that a defendant could be entitled to summary judgment by showing the absence of an *essential element* of his opponent's case. It need not disprove petitioner's case, but it must show that some essential element was missing.

Petitioner will argue that defendant failed to make the required showing.

This court stated in *Anderson v. Liberty Lobby Inc.*, 477 U.S. 257,

> "...[T]he plaintiff, to survive the defendant's motion, need only present evidence from which a jury might return a verdict in his favor. If he does so, there is a genuine issue of fact that requires a trial."

Petitioner will show that he met this test.

The opinion of the court below conflicts with previous decisions of this Court and with the decision of another circuit.

I. On The Issue Of Slander, Was Petitioner's Constitutional Right To A Jury Trial Violated?

Petitioner will show that there was a genuine issue of fact and that there was sufficient evidence favoring petitioner's claim for a jury to return a verdict in his favor.

The first contested fact was whether the slanderous statement attributed to N.J. Mabie was indeed made. The second issue of fact was whether there was an occasion of qualified privilege and whether or not it was lost by exceeding the protection of the occasion or by malice, or both.

Petitioner alleged that the slanderous statement, as stated *supra* in the statement of the case, was indeed made. Defendant denied that this was the case and moved for summary judgment. It produced the affidavit of employee N.J. Mabie denying that he made *any* statement or *any* criticism of petitioner's work to *any* person. Petitioner produced the contradicting affidavit of Greg Goff, an employee of an independent contractor, who received the statement. This affirms that there is indeed a controversy of genuine material fact. There *is* a jury issue, unless the defendant can show that it is protected by a qualified privilege and that the privilege was not abused.

The defendant then took a position inconsistent with its denial. In effect the defendant changed its position on a fundamental issue of fact. Without retracting the denial of its employee N.J. Mabie, defendant's counsel took the affidavit of Greg Goff and constructed a scenario that would, under normal circumstances, be privileged. The defendant claimed that both Mabie and

Goff were agents of the corporation, working together in their agency. As such, the occasion was privileged, and as such it wasn't published. *Defendant did this even though there was an admission on record that an employee of a contractor, working at defendant's site, was the employee of the contractor, not of the defendant.* Petitioner submitted a second affidavit from Goff in which affiant stated:

> "He [Goff] was not working on the system that Mabie was referring to, that he had no interest in Mabie's comments, that he saw no justifiable reason for the comments, and that he [Goff] was qualified by reason of sixteen years experience to distinguish between good work and bad."

Defendant's counsel, after taking an inconsistent position, attacked Goff's second affidavit, claiming that it was submitted for no other reason than to create controversy. Goff may respond under cross examination, and, as petitioner has asserted, his testimony will eliminate any controversy. *This is a jury matter.*

Petitioner does not concede that the occasion was one of qualified privilege; but let us assume, arguendo, that it was.

According to *Fulton v. Atlantic Coast Line R. Co.*, 67 S.E.2d 425,

> "Where the person exceeds his privilege and the communication complained of goes beyond what the occasion demands that he should publish, and is unnecessarily defamatory of plaintiff, he will not be protected."

Was the privilege exceeded? There was nothing in the ventilation system that Mabie was in attendance of when he slandered petitioner that would indicate to Mabie that he was looking at petitioner's work. After all, petitioner's

name did not appear on the ducts. Why did he bring petitioner into the occasion? There was absolutely no basis upon which he had the right to insinuate petitioner's involvement.

As stated in *White v. Nicholls,* 3 How. 266, 11 L.Ed. 591,

> "In every case where a communication would otherwise be privileged, falsehood and the absence of probable cause will amount to proof of malice."

Was there falsehood? Perhaps the best proof of malice is the lack of good faith indicated by Mabie's denial. Was there absence of probable cause? Mabie denied, under oath, that he had made the slanderous statement or any criticism whatsoever regarding petitioner's work to *any* person.

Defendant pleaded that petitioner had not pleaded malice. Petitioner can find no precedent where the defense of qualified privilege has been allowed to defeat the issue of malice when the making of the statement has been denied. The law protects the maker of a defaming statement under certain situations, as it should, but it is designed for those situations where a person honestly speaks his mind for legitimate reasons.

The ruling in this case by the Appeals Court directly contradicts the ruling by another Appeals Court on an almost identical issue. In the case of *Weldy v. Piedmont Airlines,* 985 F.2d 57 (2nd Circuit 1993), the court found that:

> (1) The issue of whether supervisor told co-employee that employee was being fired for "aggravated assault" was for the jury to decide.
>
> (2) The issue of whether former employer was entitled to assert qualified privilege was for a jury to decide.

Thus, decisions on issues of malice and credibility are jury functions.

On the issue of slander *per se*, petitioner has shown that he has a *prima facie* case. A jury could find:

(1) That the statement was indeed made, and

(2) Under proper instructions from the Court, that such statement was malicious.

Defendant failed to show that there was any essential element missing from petitioner's case on the issue of slander; therefore, defendant was not entitled to summary judgment. Petitioner submits that his constitutional right to a jury trial on this issue has been violated.

II. On Issue Of Libel, Was Petitioner's Constitutional Right To A Jury Trial Violated?

Petitioner will show that from the unrebutted extrinsic facts and circumstances there was sufficient evidence that a jury could find petitioner was libeled.

Defendant defended its statements contained in the *Gazette* article by pleading that Epps did not know and had never heard of petitioner, that the article was not meant to refer to petitioner, and that the article did not specifically name petitioner. This was the defendant's only defense. Petitioner proved by affidavit and by copy of a cancelled check that he had written to Epps, which Epps had endorsed, that Epps did in fact know petitioner. As a matter of law, it did not matter.

The Court in *Corrigan v. Bobbs-Merrill Co.*, 228 N.Y. 58, 63, 64 (1920), stated the following:

> "The fact that the publisher had no actual intention to defame a particular man, or indeed to injure anyone, does not prevent recovery of compensatory damages by one who connects himself with the publication of a libel, at least in the absence of some special reason for a positive belief that no one existed to whom the description answered. *He cannot show that a libel was not of and concerning the plaintiff by proving that he never heard of the plaintiff.* Reputations may not be traduced with impunity, whether under literacy forms of a work of fiction, or in jest, or by inadvertence, *or by the use of words with a double meaning.*" (Italics added).

The Court stated, "*The question is not so much who was aimed at, as who was hit.*" The material fact in dispute was whether or not reference was made to the plaintiff.

Under the unrebutted extrinsic facts and circumstances of petitioner being the only person terminated while the libelous article was posted on defendant's bulletin board, a jury could find that the article libeled petitioner.

The issues of group libel and extrinsic facts and circumstances have been well covered in a landmark case by the Oklahoma Supreme Court. Citing from 31 Columbia Law review 1322, considering group libel, the Court said:

> "*The primary consideration would properly seem to be whether the plaintiff was in fact defamed, although not specifically designated. Considerations adduced in support of the absolute denial of recovery are inconclusive, as against the desirability of providing a remedy for actual injury.*" (Italics added).
>
> "A more realistic approach would recognize that even a general derogatory reference to a group does affect the reputation of every member, and would adopt as its test the intensity of the suspicion cast upon the plaintiff."

Fawcett Publications, Inc. v. Morris Okl., 377 P.2d 42 *Certiorari Denied*, 376 U.S. 513 *Rehearing Denied*, 377 U.S. 925.

By this test, group size is relatively unimportant. The test is whether the petitioner was libeled.

Petitioner has shown, by the extrinsic facts and circumstances that have not been rebutted, that a jury could find that he was libeled.

Defendant pleaded that the article did not refer to petitioner because he was not replaced. It did not plead any defense to this article other than its contention that Epps didn't know petitioner. It did not deny the posting

of the article, nor did it produce any other person who was terminated. In fact, it admitted that under certain circumstances, the article could be libelous to petitioner. Once it is established that the article is libelous, the issue becomes a factual matter, as to whether by the extrinsic facts and circumstances, petitioner was the person libeled. A jury could find, that from the extrinsic facts and circumstances surrounding petitioner's termination, that he *was* libeled. Plain common sense shows that this would not be an implausible inference. Defendant failed to show that any essential element was missing from petitioner's case on this issue of libel. By deciding the factual issue, rather than submitting it to a jury, the District Court denied petitioner's constitutional right to a jury trial, and the Appeals Court sanctioned it.

III. On Issue Of Tortious Interference, Was Petitioner's Constitutional Right To A Trial By Jury Violated?

There are matters relevant to this issue that need to be addressed. There were irregularities in the magistrate court involving discovery and alterations of the record of the hearing. These were brought to the attention of the Appeals Court. When a record of a hearing that has been altered is used by subsequent courts in determining their decisions, fundamental issues of fairness are correctly raised.

After the close of the period of time allowed for discovery, petitioner completed in a timely manner his portion of the pretrial order and submitted it to defendant's counsel. When defendant's time expired, and its counsel could not be reached by phone, petitioner called the court's law clerk. After waiting five days, petitioner filed his portion in the district court. He then filed *Notice of Defendant's Failure to Timely Submit Pretrial Order.*

In petitioner's portion of the pretrial order, he listed eighteen witnesses that he expected to call. In *Celotex Corp. v. Catrett,* 477 U.S. 317 at 324, Justice Renquist states, "Obviously rule 56 does not require the non-moving party to depose her own witnesses." In the instant case defendant did not conduct any discovery. In order to defeat summary judgment, petitioner should not be required to depose his own witnesses, especially in a case where half are hostile witnesses. Petitioner looked forward to and was prepared for the first pretrial conference, and he expected to discuss with the court the testimony of his witnesses, his theory of the case, and the contested issues of law and of fact. He did not get the opportunity because the District Court awarded the defendant summary judgment.

In his dissent in *Catrett v. Johns-Manville Sales Corp.*, 756 F.2d 181 (1985), Judge Bork states,

> "...Under some circumstances, trial judges may grant summary judgment sua sponte so long as the losing party was on notice that he had to come forward with *all* his evidence ... Summary judgment does not require affirmative evidentiary proof of the absence of a factual dispute. Rather, the trial judge *need only notice this absence and demand that it be corrected.* If it is not corrected, after notice, it becomes the trial judge's duty to grant summary judgment to conserve judicial resources and avoid a useless trial." (Emphasis added).

Petitioner does not argue the trial court's right to award summary judgment where such is due, but the procedure should not degenerate into a tool used simply to reduce the court's work load. When it has been so used, it must not be allowed to stand. As stated in *Avrick v. Rockmont Envelope Co.*, 155 F.2d 568,

> "An expeditious disposition of cases is a cardinal virtue of the administration of justice, but it is not more important than one's fundamental right to his full day in court."

Even without a full and fair opportunity to be heard, petitioner will show that defendant failed to show that an essential element of his case was missing on the issue of tortious interference in contract and expectancies. Where motive and intent are key to proving liability, petitioner had third party affidavits to support his case that the defendant fails to mention in its pleadings. (Appendix at pp. A8-A16, A21-A22).

In West Virginia, to establish *prima facie* proof of tortious interference, a plaintiff must show:

> (1) existence of a contractual or business relationship or expectancy;

(2) an intentional act of a party outside that relationship or expectancy;

(3) proof that the interference caused the harm sustained; and

(4) damages.

C. W. Development, Inc. v. Structures, Inc., 408 S.E.2d 41 (W.Va. 1991).

Petitioner will address each of these requirements in order:

(1) It is not contested that petitioner had an at will contract with MTI, terminable at the will of either, *not at the will of a non party.* As to his expectancy, petitioner had enjoyed the benefits of the contract for more than five years. A jury could find that it was reasonable for him to expect that it would continue.

(2) As a matter of law, defendant was an outsider to that contract. Defendant was not named in the contract. The fact that defendant had a contract between itself and MTI does not make defendant a party to petitioner's own contract with MTI.

Furthermore, petitioner was not party to the contract between defendant and MTI. Contrary to the affidavits of Bartrug and defendant's purchasing agent Barbara Toler, defendant did not specifically request the services of petitioner as an HVAC engineer. Petitioner was not distinguished from any of MTI's other mechanical engineers. No Union Carbide purchase order for *his* explicit HVAC services existed. When so requested, under rule 34 FRCP, defendant failed to produce a purchase order that specifically showed petitioner's name.

As to acts of parties outside the relationship between petitioner and MTI, his employer, any act that prevented petitioner's performance would be an act of interference. When defendant informed

petitioner that he was terminated and took his electronic gate pass, both he and MTI were *prevented* from performing.

(3) As to proof that the interference caused the harm sustained, the act is not so far removed, either in fact or in law, as not to be obvious. Defendant did not deny that it gave petitioner notice of termination of employment.

(4) As to damages, these were stated in the pleadings and are ongoing. They continue to accrue because petitioner has found only intermittent employment.

Defendant claimed that petitioner had not met his burden of proof as to factors (2) and (3) listed *supra* in *C. W. Development, Inc. v. Structures, Inc.* Defendant argued that the actions it took were within its rights under its contract with MTI.

Article VII (a) of that contract states:

"The work shall be performed by Contractor as an independent contractor, and all its [contractor's] employees engaged in the performance of the work shall be employed, promoted, disciplined, *discharged*, and assigned *solely by contractor* . . . ." (Emphasis added).

Furthermore, Article XVIII (a) of that contract limits all notices affecting the contract to notices given in writing between *designated representatives* of the two parties, which the contract named as Fred Carney for MTI and Barbara Toler for defendant. Clause (c) of this article provides against *any other means* of giving notice other than in writing. No article in that contract between defendant and MTI provides for defendant to *single* out one of MTI's employees and *terminate* him.

In its attempt to justify its interference defendant listed the factors identified in Section 767 of the 2nd Restatement of Torts and claimed, without any

specificity whatsoever, that an application of those factors established that the interference was proper. The factors are listed below:

(a) the nature of the actor's conduct,
(b) the actor's motive,
(c) the interests of the other with which the actor's conduct interferes,
(d) the interests sought to be advanced by the actor,
(e) the social interests in protecting the freedom of action of the actor and the contractual interests of the other,
(f) the proximity or remoteness of the actor's conduct to the interference, and
(g) the relations between the parties.

The listing of the factors alone, with no other pleading than that the actions which defendant took were within its rights under its contract with MTI, fails to show that petitioner's claim was missing any essential element. On the contrary, an argument was made that the factors, when considered in light of the facts, tend to do the opposite.

As a matter of law, the fact that defendant had a contract with petitioner's employer does not justify defendant's interference in petitioner's contract unless such interference advances defendant's own legitimate interests. The existence of such a contract, by itself, does not give defendant the right to interfere in another's contract. This principle of law is illustrated by the case of *Jack D. Smith v. Ford Motor Company, et al.*, 221 S.E.2d 282.

Ford Motor Company had a contract with Cloverdale Ford, Jack Smith's employer. The court held that Jack Smith could maintain his interference action against Ford Motor because Ford Motor had no other reason for its interference other than its dislike of Smith's activity

in the alliance of the dealers association. The fact that Ford Motor had a contract with Cloverdale Ford was not sufficient to defeat Smith's claim. This principle is upheld in *Childress v. Abeles,* 84 S.E.2d 176, in which the court stated:

> "[T]he overwhelming weight of authority in this nation is that an action in tort lies against an outsider who knowingly, intentionally, and unjustifiably *induces* one party to a contract to breach it to the damage of the other party."

The Second Restatement of Torts, subsection 766, uses the clause *inducing or otherwise causing* in reference to the above issue.

Both of the above cases are very much similar to the instant case, wherein defendant's employee J.A. Bowyer acted to carry out his threat "to get Carl Lamb, no matter what." Defendant's interference in petitioner's contract was tortious and, therefore, improper. Such interference *cannot* be defended on the ground that it was lawful.

A breach of a contract is an unlawful act. Defendant may not say that its actions were permitted under its contract and cannot claim that it had a lawful right to interfere in petitioner's contract, if the action it took against petitioner was a breach of the contract under which it acted. It is true that petitioner could not complain about defendant's breach because he was not a party to the contract breached. It is also true that defendant may not defend, as a matter of law, that its action taken against petitioner was the exercise of a lawful right, if its action breached the terms of the contract under which it acted, whether petitioner had a claim for the breach or not. Defendant did not act lawfully. The contract under which defendant acted did not provide for it to do what it did.

As the above cases show, defendant is required to have some legitimate reason for such interference, other than its malice. Defendant failed to make that showing.

Petitioner pleaded that J.A. Bowyer hired N.J. Mabie, placed him in G.R. Hattiangadi's group, and then arranged to transfer the petitioner's work from A.B. Williamson's group to Hattiangadi's group for the sole purpose of carrying out his malicious threat to replace petitioner. The evidence petitioner offered was:

1. Petitioner's own testimony that Bowyer threatened, without any provocation, to replace him.

2. The affidavit of William Millar, a coworker, as to petitioner's excited utterances soon after the threat was made.

3. The affidavit of Cecil Absten, Jr., which states that Bowyer had announced to him, "...I am going to get him [petitioner] no matter what ... If I ever get the power, I will get rid of Carl Lamb ..."

4. An admission by defendant that Bowyer had recommended hiring Mabie.

5. Defendant's admission that the petitioner's work was transferred from Williamson to Hattiangadi.

6. Bowyer's affidavit, which establishes his knowledge of Mabie's hiring:

"...[A]lthough Norman Mabie was hired in order to perform general mechanical engineering tasks, Union Carbide was aware that Mabie had some background in HVAC work."

7. Carol Sue Flowers' affidavit, which does confirm that Bowyer *was* responsible for hiring Mabie and demonstrates Bowyer's deliberate insistence on placing Mabie where Bowyer wanted him. (This testimony could be admissible under the conspiracy exceptions rule.).

To support its defense that petitioner *imagined* that Bowyer hired Mabie to replace him, defendant submitted Bartrug's affidavit, which stated, in part:

> "... [B]y mid-1991 the amount of HVAC work that needed to be performed had decreased sharply. As a result, it was determined that Union Carbide no longer needed ... an engineer to perform HVAC work ... [P]rior to this determination, Norman J. Mabie was hired as an employee of Union Carbide as an engineer. Although Mr. Mabie does have some HVAC background and may undertake some of the ... HVAC work that now needs to be done, Mr. Mabie was not hired to replace Carl Lamb ..."

Defendant also submitted the affidavit of its employee, J.A. Bowyer, which includes the following:

> "...In mid-1991 the amount of HVAC work that needed to be performed ... had decreased sharply ... [A]lthough Norman Mabie was hired in order to perform general mechanical engineering tasks, Union Carbide was aware that Mabie had some background in HVAC work, and it was determined that the ... remaining HVAC work could be performed by Norman Mabie ..."

As stated *supra*, defendant could not prove that it had specifically requested from MTI the services of an HVAC engineer. Nevertheless, petitioner, a mechanical engineer by trade, was assigned to perform HVAC work for defendant. Petitioner was no more limited to HVAC work than was Mabie, as both were mechanical engineers by trade. Therefore, Bartrug's statement that the defendant did not replace petitioner with Mabie was contradicted by assigning Mabie, who was also a mechanical engineer by trade, the responsibility of performing petitioner's work.

This position is further corroborated by the petitioner's unrebutted pleading, which includes the following:

> " . . .[O]n the first hour of his first day of employment, Mabie was escorted to petitioner's office. His very first words were 'Which one of you guys does the HVAC?' [Mabie then said to petitioner] '. . .[Y]ou are supposed to show me all that you are doing . . .' "

In light of the fact that mabie was escorted directly to petitioner's office on his first day in defendant's employ and subsequently instructed the petitioner to show him all HVAC work that petitioner was performing, it becomes evident that:

> (1) Mabie's hiring was a premeditated attempt to replace petitioner.
>
> (2) Mabie was engaged to perform HVAC work, rather than the "general mechanical engineering tasks" that the defense maintains is the case.

Furthermore, the claim by Bowyer and Bartrug that Mabie was hired to perform "general mechanical engineering tasks" is inconsistent with defendant's statements in the article that appeared in *The Charleston Gazette,* which referred to forthcoming layoffs. It is unusual that a company experiencing a downturn would hire for general mechanical engineering needs; it would seem that such a company would hire only for specialty needs.

In his affidavit, E. Bartrug maintains that, ". . .Mr. Mabie . . . in fact works for a different internal work group than that for which Mr. Lamb performed his services." J.A. Bowyer's affidavit includes that ". . .Norman J. Mabie was . . . placed in the work group supervised by G.R. Hattiangadi." the above sworn testimony confirms the petitioner's claim that Mabie was placed in G.R. Hattiangadi's group. Petitioner maintains that the transfer of HVAC work from A.B. Williamson to Hattiangadi was not coincidental. Rather, it was a

deliberate, premeditated action implemented by defendant to replace petitioner, who worked under Williamson.

Bowyer's affidavit also denies that he "threatened to replace Carl Lamb or state[d] to any third party that . . . [he] was going to get Carl Lamb." Petitioner refuted Bowyer's sworn statement via the affidavit of Cecil Absten, Jr., in which Absten stated, as referred to *supra*, that Bowyer did indeed announce his malicious intentions for the petitioner.

Bowyer's affidavit, which was dated January 8, 1992, stated ". . .[t]hat as of this date Norman Mabie has only worked on one HVAC project." Petitioner has refuted this by stating that as part of the requirement that he turn over his work to Mabie, petitioner informed Mabie that several HVAC jobs were *required* to be performed in order to comply with Occupational Safety and Health Administration (OSHA) laws. Therefore, defendant's allegations that little HVAC work remained and that Mabie performed only one HVAC assignment are contested issues of fact.

Petitioner questioned in his portion of the pretrial order (in which defendant refused to participate), under contested issues of fact, "Does defendant's oral notice of termination constitute proper notice of termination, to be effective as the only notice that plaintiff ever received, in view of defendant's contention that it did not terminate plaintiff?"

Bartrug's affidavit specifically refers to the termination of the petitioner:

> ". . . [P]ursuant to the contract between Union Carbide and MTI, Union Carbide notified MTI that it was terminating its request for an engineer to perform HVAC work."

As petitioner has previously argued, defendant did not specifically request the services of an HVAC engineer in its purchase order, as the defense has pleaded. Petitioner responded by affidavit that he could find no person at MTI who had received any notice of his termination and named the persons that he had asked. A better proof is that the contract requires that notices be in writing and, when requested under rule 34 FRCP, defendant could not produce any such written notice.

This court stated in *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 257,

> "... [T]he plaintiff, to survive the defendant's motion, need only present evidence from which a jury might return a verdict in his favor. If he does so, there is a genuine issue of fact that requires a trial."

Obviously, there are genuine controversies of material fact, since both of the positions maintained by the petitioner and the defendant cannot be true. Thus, it is a jury function to decide upon these contested issues of fact.

There are numerous inferences that may be raised. According to *Adickes v. S. H. Kress & Co.*, 398 U.S. 144 (1970) at 158-159:

> "Credibility determinations, inferences, the weighing of the evidence, and the drawing of legitimate interferences from facts are jury functions, not those of a judge, whether he is ruling on a motion for summary judgment or for a direct verdict. The evidence of the non movant is to be believed and all justifiable inferences are to be drawn in his favor."

Defendant submitted its affidavits early in order to *railroad* its motion for summary judgment through the court. The magistrate accepted those affidavits as gospel truth. His finding of fact is almost an identical copy of

defendant's pleadings and affidavits. In fact, all look as if they are carbon copies of one another. No one has considered that each of the defendant's affidavits was contradicted by petitioner after each was filed. Furthermore, the petitioner's affidavits are not even mentioned in any of the documents of the defense or of the courts. Defendant has not shown that an essential element is missing from petitioner's case. Both petitioner and defendant have shown that the facts need to be resolved by a jury.

A jury should have decided the following:

(1) Whether it believed petitioner and his witnesses.

(2) Whether the fact that Hattiangadi did not himself interview Mabie is unusual, considering that Hattiangadi was an important group leader and that Mabie would be working under him.

(3) Whether Bowyer made and carried out threats against petitioner.

(4) Whether Mabie was indeed hired by defendant to replace petitioner, thus implementing Bowyer's threats.

This case, with numerous contested factual issues, where petitioner has made a *prima facie* case in spite of limited discovery, is *not* a case for summary judgment. The questions presented here involve complex issues of fact, the type of questions that the Supreme Court has warned "... should seldom be disposed of by summary procedures." *Poller v. Columbia Broadcasting System, Inc.*, 368 U.S. 464, 82 S.Ct. 486.

Petitioner's case, like Poller's case, involved motive, intent, malice, and issues of fact and credibility. *All* of these are jury functions.

SUMMARY

Petitioner Is Entitled To A Jury Trial.

Summary judgment by the District Court without a full and fair hearing was inappropriate. The Appeals Court failed to consider that its order affirming the District Court's decision was contrary to the finding by another appeals court on a similar issue, and that it conflicts with previous decisions of this Court. On the slander claim, what was the missing essential element? If there was privilege, whether or not there was malice is a jury function. On the libel claim, the extrinsic facts and circumstances are for a jury, not a judge, to decide.

On the tortious interference claim, where the most difficult issue to prove is usually intent, the evidence in this case clearly shows intent. It is clearly a jury function to decide upon this issue.

Citing again from *Anderson v. Liberty Lobby,* which was cited at the beginning of the argument, "... [T]he plaintiff to survive the defendant's motion, need only present evidence from which a jury might return a verdict in his favor. If he does so, there is a genuine issue of fact that requires a trial."

Therefore, according to the conditions set forth above and in the cases cited herein, the requirements for trial by jury have been met. The plain simple language of the Seventh Amendment to the Constitution is clear, and it is no less important today than it was in 1791. *Petitioner is entitled to a trial by jury.*

Respectfully submitted,

Carl V. Lamb, *Pro Se*
P.O. Box 8612
South Charleston, WV 25303
(304) 755-3518

APPENDIX

Notice of Issuance of Mandate from United States Court of Appeals for the Fourth Circuit Dated January 12, 1994.

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

FILED
January 11, 1994

No. 92-1840
CA-91-1049-2

Lamb v. Union Carbide Corp

M A N D A T E

The judgment of this Court dated 12/8/93 takes effect today.

BERT M. MONTAGUE
CLERK

Order on Petition for Rehearing with Suggestion for Rehearing *In Banc*— Denied January 6, 1994.

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

FILED
January 4, 1994

No. 92-1840
CA-91-1049-2

CARL V. LAMB,
Plaintiff-Appellant,

v.

UNION CARBIDE CORPORATION,
Defendant-Appellee.

ENTERED
Jan—6 1994
_____ ORDER BOOK
NO. _____ PAGE _____

On Petition for Rehearing with Suggestion for Rehearing *In Banc*

The appellant's petition for rehearing and suggestion for rehearing *in banc* were submitted to this Court. As no member of this Court or the panel requested a poll on the suggestion for rehearing *in banc*, and

As the panel considered the petition for rehearing and is of the opinion that it should be denied,

IT IS ORDERED that the petition for rehearing and suggestion for rehearing *in banc* are denied.

For the Court,

/s/ Bert M. Montague
CLERK

A True Copy Atteste:
Bert M. Montague, Clerk
BY Pamela K. Stump
Deputy Clerk

Opinion of United States Appeals Court for the Fourth Circuit Dated December 8, 1993.

UNPUBLISHED

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

CARL V. LAMB,
Plaintiff-Appellant,

v.

UNION CARBIDE CORPORATION,
Defendant-Appellee.

No. 92-1840

Appeal from the United States District Court
for the Southern District of West Virginia, at Charleston.
Charles H. Haden, II, Chief District Judge.
(CA-91-1049-2)

Submitted: November 4, 1993

Decided: December 8, 1993

Before MURNAGHAN, NIEMEYER, and WILLIAMS, Circuit Judges.

Affirmed by unpublished per curiam opinion.

COUNSEL

Carl V. Lamb, Appellant Pro Se. Gary Wayne Hart, Anthony J. Majestro, JACKSON & KELLY, Charleston, West Virginia, for Appellee.

Unpublished opinions are not binding precedent in this circuit. See I.O.P. 36.5 and 36.6.

OPINION

PER CURIAM:

Appellant appeals from the district court's order dismissing his complaint alleging tortious interference with contract, libel, and slander. Our review of the record and the district court's opinion accepting the recommendation of the magistrate judge discloses that this appeal is without merit. Accordingly, we affirm on the reasoning of the district court.* *Lamb v. Union Carbide Corp*, No. CA-91-1049-2 (S.D.W. Va. June 11, 1992). We dispense with oral argument because the facts and legal contentions are adequately presented in the materials before the Court and argument would not aid the decisional process.

AFFIRMED

*Lamb's motion to expedite the determination of his appeal is now moot and is dismissed for that reason.

**Order of United States District Court—
Southern District of West Virginia
Dated June 11, 1992.**

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF WEST VIRGINIA

CHARLESTON DIVISION

ENTERED
JUN 11, 1992
_____ ORDER BOOK
NO. _____ PAGE _____

CIVIL ACTION NO. 2:91-1049

CARL V. LAMB,

Plaintiff,

vs.

UNION CARBIDE CORPORATION,

Defendant.

O R D E R

Pending are cross motions for summary judgment. This matter was previously referred to the Honorable Jerry D. Hogg, United States Magistrate Judge, for submission to this Court of his proposed findings of fact and recommendation for disposition. On April 17, 1992, Magistrate Judge Hogg submitted his Report-Recommendation and recommended that Defendant's motion for summary judgment be granted, Plaintiff's

motion for summary judgment be denied, and that this case be dismissed and stricken from the docket of the Court.

The Plaintiff timely filed objections to the Magistrate Judge's Report-Recommendation. Having reviewed *de novo* those portions of the Report-Recommendation to which Plaintiff objects, the Court concludes that the objections are without merit. Accordingly, the Court adopts and incorporates herein the Magistrate Judge's Report-Recommendation and ORDERS that the Defendant's motion for summary judgment is granted, that Plaintiff's motion for summary judgment is denied, and that this action is dismissed and stricken from the docket of the Court.

The Clerk is directed to send a copy of this Order to counsel of record.

ENTER: June 11, 1992

CHARLES H. HADEN II
Charles H. Haden II, Chief Judge

A TRUE COPY, Certified this

JUN 11 1992

RONALD D. LAWSON, Clerk
BY Eugenia Berger DEPUTY

Affidavit of Cecil Absten, Jr.,
Dated January 31, 1992.

IN THE UNITED STATES DISTRICT COURT
FOR THE
SOUTHERN DISTRICT OF WEST VIRGINIA

Civil Action
#2-91-1049

CARL V. LAMB,

Plaintiff,

vs.

UNION CARBIDE CORPORATION,

Defendant.

AFFIDAVIT

State of West Virginia
County of Kanawha, to Wit:

This day personally appeared before me the undersigned authority, Cecil Absten, Jr., who being duly sworn on his oath deposes and says as follows:

1. That I am the foreman for the Denny Hill Company and that I was assigned to work at Union Carbide Corporation for the past 6 years for the Denny Hill Company.

2. That I have personal knowledge of the statements made in this affidavit.

3. That during the past 6 years I performed services for James A. Bowyer at Union Carbide on more than one occasion.

4. That during the spring of 1989, James A. Bowyer stated to me: "Carl Lamb is responsible for the cost overrun on the dock shelter job. It makes it look like Steve Brewer and I don't know what we are doing, and I am going to get him no matter what."

5. He also stated the same intention later that same year saying, "If I ever get the power, I will get rid of Carl Lamb, Hattiangadi and John Maier."

Further this affiant sayeth not.

CECIL ABSTEN, JR.
Cecil Absten, Jr.

The foregoing instrument was acknowledged before me this 31 Day of January, 1992. by Cecil Absten, Jr.
My Commission Expires March 1, 1999.

JOYCE A. FISHER
Notary Public

(Seal)

OFFICIAL SEAL
NOTARY PUBLIC
STATE OF WEST VIRGINIA
JOYCE A. FISHER
P.O. BOX 1793
Charleston, West Virginia 25326
My Commission Expires March 1, 1999

Affidavit of Carol Sue Flowers,
Dated February 25, 1992.

IN THE UNITED STATES DISTRICT COURT
FOR THE
SOUTHERN DISTRICT OF WEST VIRGINIA

Civil Action
#2-91-1049

CARL V. LAMB,

Plaintiff,

vs.

UNION CARBIDE CORPORATION,

Defendant.

AFFIDAVIT

State of West Virginia
County of Kanawha, to Wit:

This day personally appeared before me the undersigned authority, Carol Sue Flowers, who being duly sworn on her oath deposes and says as follows:

1. That I am a real estate agent employed by the Old Colony Company.

2. That I have personal knowledge of the statements made in this affidavit.

3. That I have known the plaintiff in this case for eight (8) years, and that he has referred customers to me from Union Carbide that have resulted in sales, and that he referred to me a Mr. Norman J. Mabie.

4. That on Sunday, June 2, 1991, I drove Mr. Mabie through Teays Valley, attempting to find a house that he might rent. I showed him a house in Teays Meadows, but he expressed doubt that he could back his boat into the garage. We drove into Sleepy Hollow Towneship, and he pointed out Jim Bowyer's house and said. "There's where the man lives who hired me." He further stated that he and Mr. Bowyer had become good friends and that he might ask if he could park his boat in Mr. Bowyer's three-car garage. Mr. Mabie said that, originally, he was supposed to work for Mr. Bowyer, but that Mr. Bowyer had *insisted* that he be placed in another group than that for which he had been hired.

5. I continued to assist Mr. Mabie for another two or three weeks until he rented a house on Montrose Hill in South Charleston.

Further this affiant sayeth not.

CAROL SUE FLOWERS
Carol Sue Flowers

The foregoing instrument was acknowledged before me this 25 day of February, 1992. by Carol Sue Flowers.
My Commission Expires 3-29-99.

LINDA KAY WENDELL
Notary Public

(Seal)

OFFICIAL SEAL
NOTARY PUBLIC
STATE OF WEST VIRGINIA
LINDA KAY WENDELL
608-613 MacCorkle Av., SW
ST. ALBANS, W. Va. 25177
My Commission Expires 3-29-99

**Affidavit of Gregory A. Goff,
Dated January 31, 1992.**

IN THE UNITED STATES DISTRICT COURT
FOR THE
SOUTHERN DISTRICT OF WEST VIRGINIA

Civil Action
#2-91-1049

CARL V. LAMB,

Plaintiff,

vs.

UNION CARBIDE CORPORATION,

Defendant.

AFFIDAVIT

State of West Virginia
County of Kanawha, to Wit:

This day personally appeared before me the undersigned authority, Gregory A. Goff, who being duly sworn on his oath deposes and says as follows:

1. That I am an HVAC Technician employee of the Denny Hill Company and that I was assigned to work at Union Carbide Corporation for the past six years.

2. That I have personal knowledge of the statements made in this affidavit.

3. That on September 10, 1991, in company with Cecil Absten, Jr., the foreman of Denny Hill Company, and Norman J. Mabie, the Union Carbide engineer, I visited the 2nd floor control room of Union Carbide Corporation, Building 42 for purposes of investigating loss of air flow.

4. At the site, Norman J. Mabie took exception to the design of the system we were attending, being critical of the dampers and their operation. While standing with me on the platform adjacent to the control room roof and looking at the HVAC unit, ducts and dampers, he made the statement to me, "This must be another one of Carl Lamb's screw-ups".

Further this affiant sayeth not.

GREGORY A. GOFF
Gregory A. Goff

The foregoing instrument was acknowledged before me this 31 day of January, 1992. by Gregory A. Goff.
My Commission Expires March 1, 1999.

JOYCE A. FISHER,
Notary Public

(Seal)

OFFICIAL SEAL
NOTARY PUBLIC
STATE OF WEST VIRGINIA
JOYCE A. FISHER
P. O. Box 1793
Charleston, West Virginia 25326
My Commission Expires March 1, 1999

Affidavit of Gregory A. Goff,
Dated February 26, 1992.

IN THE UNITED STATES DISTRICT COURT
FOR THE
SOUTHERN DISTRICT OF WEST VIRGINIA

Civil Action
#2-91-1049

CARL V. LAMB,

Plaintiff,

vs.

UNION CARBIDE CORPORATION,

Defendant.

AFFIDAVIT

State of West Virginia
County of Kanawha, to Wit:

This day personally appeared before me the undersigned authority, Gregory A. Goff, who being duly sworn on his oath deposes and says as follows:

1. That I have personal knowledge of the statements made in this affidavit.

2. That this affidavit is made to clarify some of the events of September 10, 1991.

3. That Norman J. Mabie and I went to Building 42 to investigate loss of air flow. When we got there, it was obvious that the problem had been corrected and that we did not have anything to investigate. As we were leaving, Cecil Absten, Jr., received a message on his pager to make a phone call, and Mr. Mabie and I waited for him to make this call. While we were outside the control room waiting for Cecil Absten, Mr. Mabie began criticizing the ducts, the dampers, and the HVAC unit. It was then he said, "This must be another one of Carl Lamb's screw-ups." This startled me. I wasn't sure that I had heard him correctly, so I asked him, "How's that?", and he repeated the above statement a second time. When Absten returned, we drove Mabie to Building 82.

4. That after we left Mabie, I told Absten that I didn't need Mabie to help me do my work. I then asked Absten not to involve Mabie in any future work that we might have to do. Absten then stated that he had asked Mabie to come along with us in case we needed Mabie to sign a purchase requisition.

5. That the comments Mr. Mabie made to me were not on the subject matter of our work. I was not working on the system that he considered to be a screw-up (nor was he), and I did not see anything wrong with it. Nor did I have any interest in his opinion.

6. That I have sixteen (16) years experience in all areas of HVAC work (including electrical, plumbing, ducting, controls, and refrigeration), and I feel that I am qualified to make a distinction between good work and bad work. I saw no justifiable reason for Mabie's comments.

7. That sometime afterwards, I saw Mr. Lamb at the home of a mutual friend. Lamb asked me, "Who did Mabie make the statement 'This must be another one of Carl Lamb's screw-ups' to?" I then told him that Mabie had made it to me.

Further this affiant sayeth not.

GREGORY A. GOFF
Gregory A. Goff

The foregoing instrument was acknowledged before me this 26th day of February, 1992. by Gregory A. Goff.

My Commission Expires February 12, 1995.

JUDITH M. TAYLOR
Notary Public

(Seal)

OFFICIAL SEAL
NOTARY PUBLIC
STATE OF WEST VIRGINIA
JUDITH M. TAYLOR
120 Ranch Lake Boulevard
Scott Depot, West Virginia 25560
My Commission Expires Feb. 12, 1995

Affidavit of Carl V. Lamb,
Dated February 26, 1992.

IN THE UNITED STATES DISTRICT COURT
FOR THE
SOUTHERN DISTRICT OF WEST VIRGINIA

Civil Action
#2-91-1049

CARL V. LAMB,

Plaintiff,

vs.

UNION CARBIDE CORPORATION,

Defendant.

AFFIDAVIT

State of West Virginia
County of Kanawha, to Wit:

This day personally appeared before me the undersigned authority, Carl V. Lamb, who being duly sworn on his oath deposes and says as follows:

1. That I am Carl V. Lamb, the plaintiff in this case, and this is my second affidavit.

2. That I have personal knowledge of the statements made in this affidavit.

3. That during the two weeks from August 9 to August 23, 1991, when I was being dismissed from Union Carbide, I called MTI to determine who, if anyone, might have knowledge of my termination. I spoke with Rod Boyle, John Scaff, Fred Carney, Ralph Barnes, Tom Sikora, and Jackie Hunter. None of them knew anything about it.

Further this affiant sayeth not.

CARL V. LAMB
Carl V. Lamb

The foregoing instrument was acknowledged before me this 26 day of February, 1992. by Carl V. Lamb.

My Commission Expires 3-29-99.

LINDA KAY WENDELL
Notary Public

(Seal)

OFFICIAL SEAL
NOTARY PUBLIC
STATE OF WEST VIRGINIA
LINDA KAY WENDELL
608-613 MacCorkle Av., SW
ST. ALBANS, W. Va. 25177
My Commission Expires 3-29-99

Affidavit of Carl V. Lamb,
Dated February 6, 1992.

IN THE UNITED STATES DISTRICT COURT
FOR THE
SOUTHERN DISTRICT OF WEST VIRGINIA

Civil Action
#2-91-1049

CARL V. LAMB,

Plaintiff,

vs.

UNION CARBIDE CORPORATION,

Defendant.

AFFIDAVIT

State of West Virginia
County of Kanawha, to Wit:

This day personally appeared before me the undersigned authority Carl V. Lamb, who being duly sworn on his oath deposes and says as follows:

1. That I am Carl V. Lamb, plaintiff in this case.

2. That this statement is made for the purpose of refuting the claim of Thad Epps, spokesman for Union Carbide Corporation, that he has never heard of me.

3. In June of 1986, I purchased an automobile from Thad Epps that he represented to me as being in good condition. Three weeks after the purchase, while driving on Interstate 64, westbound between Dunbar and Nitro, West Virginia, the right frame of this automobile collapsed, allowing the right rear bumper to drop down and strike the highway.

4. Attached to this affidavit is plaintiff's Exhibit "B" which is a true copy of the front and back of the check I wrote to Mr. Epps on the car.

Further this affiant sayeth not.

CARL V. LAMB
Carl V. Lamb

The foregoing instrument was acknowledged before me this ~~4th~~ 6th day of February, 1992.
My Commission Expires 5-23-99.

SHIRLEY T. BIRD
Notary Public

(Seal)

OFFICIAL SEAL
NOTARY PUBLIC
STATE OF WEST VIRGINIA
SHIRLEY T. BIRD
608-613 MacCorkle Av., SW
ST. ALBANS, W. Va. 25177
My Commission Expires 5-23-99

Affidavit of William Millar,
Dated February, 1992.

IN THE UNITED STATES DISTRICT COURT
FOR THE
SOUTHERN DISTRICT OF WEST VIRGINIA

Civil Action
#2-91-1049

CARL V. LAMB,

Plaintiff,

vs.

UNION CARBIDE CORPORATION,

Defendant.

AFFIDAVIT

State of West Virginia
County of Kanawha, to Wit:

This day personally appeared before me the undersigned authority William Millar who being by me first duly sworn on his oath deposes and says as follows:

1. That I have personal knowledge of the statements made in this affidavit.

2. That I am presently employed at Nissan in Smryna, Tennessee, but was employed by MTI on Union Carbide work from September 2, 1986. In March 1988, I was assigned to Building 82 at Union Carbide where I worked until May 31, 1990, directly with the plaintiff in this case, Carl V. Lamb.

3. In late February or early March of 1989, Carl V. Lamb informed me that he was going to a meeting at Building 202 with James A. Bowyer. Within an hour or so, Carl Lamb returned. I observed that he was in a highly excited agitated state, shaking his head from side to side and talking to himself. When I inquired, "What was the matter?", he said, "I can't believe that he actually threatened my job." When I inquired further, he told me that at the meeting he had said to Bowyer that he would not install a fan if he knew that the installation was improper and that Bowyer has responded, "Don't be to sure of yourself, I might replace you" and when he had responded, Bowyer then said that "I will replace you."

Further this affiant sayeth not.

WILLIAM MILLAR
William Millar

STATE OF WEST VIRGINIA
COUNTY OF PUTNAM

The foregoing instrument was acknowledged before me this (illegible) day of February, 1992 by William Millar.

My Commission Expires Aug. 14, 2001.

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Plaintiff's Exhibit "A"—Newspaper Clipping
from *Charleston Gazette,* August 8, 1991.

Union Carbide layoffs likely, official says

By Jim Balow
STAFF WRITER

Some Union Carbide employees in the Kanawha Valley are likely to be laid off as part of a corporate cost-saving drive, Carbide spokesman Thad Epps said Wednesday.

However, the exact number of jobs in jeopardy has not been determined and will depend on the outcome of an examination of job duties, Epps said.

Carbide officials ordered the latest round of cost-saving measures shortly after results of the company's second-quarter performance were announced July 24, Epps said.

"Carbide Corporation financial performance over the last two quarters was unacceptable, to use a charitable term," he said. "There are other words I could use.

"The performance was unacceptable compared to our competition, unacceptable to our shareholders and unacceptable to our corporate goals. With that situation, we're saying we've got to improve the bottom line.

"That has got to involve reduction of costs, and a big part of that is personnel costs."

Epps said the company is likely to cut its use of outside contractors and consultants, and will eliminate jobs through attrition and retirements. "There may well be some layoffs down the road."

Carbide officials have not set specific goals for cutting costs and jobs at each facility, but have promised to cut costs for the entire chemicals and plastics division by $200 million within three years. That division employs about 4,600 people statewide, including about 2,600 at the Tech Center, 900 at the South Charleston Plant and 180 at the Institute Plant.

"It's belt-tightening time," Epps said. "The timetable is now. We need a quick fix. The results of this will be felt before the end of the year.

"For people who feel they are good performers and are truly interested in the continued viability of their jobs, it's good news," Epps said. "It's going to strengthen the corporation.

"For a person who feels his performance is marginal or who feels his job is not one that is important to the overall mission of the corporation, that person might have some apprehension."

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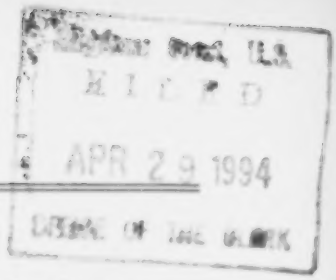

In The

Supreme Court of the United States

October Term, 1993

CARL V. LAMB,

Petitioner,

v.

UNION CARBIDE CORPORATION,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether this Court should grant certiorari to review the fourth circuit's affirmance of the district court's fact specific determination that Carl Lamb failed to meet his burden of showing the existence of a disputed issue of material fact necessary to defeat Union Carbide's Motion for Summary Judgment.

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STATEMENT OF THE CASE

The Petitioner, Carl V. Lamb, seeks review in this Court of the affirmance by the fourth circuit of the district court's determination that he could not meet his burden of showing the existence of a disputed issue of material fact necessary to defeat Respondent's motion for summary judgment.

The Statement of the Case presented to this Court by the Petitioner contains scant references to the record. A review of the record and the affidavits filed by Petitioner in support of his opposition to summary judgment, *see* Petition at A8-A22, reveals that the Petition contains numerous factual allegations which were not supported by Petitioner's affidavits and/or never argued before any of the courts below. This statement is based upon all the affidavits filed in this case including those filed by Union Carbide and attached to this Response.

On November 28, 1988, the Respondent, Union Carbide Chemicals and Plastics Company Inc. formerly known as Union Carbide Corporation ("Union Carbide"), entered into a contract with Midwest Technical, Inc. ("MTI") for the temporary assignment of MTI employees to various Union Carbide facilities in various classifications. The contract gave Union Carbide the unfettered discretion to terminate the request for assignment of MTI employees at any time and without restriction and required MTI to thereafter increase or decrease the number of its employees so assigned.

Pursuant to the contract Union Carbide requested MTI to provide it an engineer to perform technical work in the field of industrial heating, ventilation, and air

conditioning ("HVAC") at one of Respondent's South Charleston, West Virginia facilities. Petitioner, an employee of MTI, received this temporary assignment.

By mid 1991, Union Carbide determined that it no longer needed the HVAC services from MTI being provided by Lamb. MTI was notified of this decision, and, apparently, Lamb was laid off by MTI.

Prior to this decision, Union Carbide had hired Norman J. Mabie as an in-house engineer. Petitioner alleges that Mabie was hired as part of a "plot" to replace him. The undisputed facts establish that Mabie was assigned to an internal work group different than Lamb's and, at the time the motion for summary judgment was filed, had only worked on one HVAC project.

Thad Epps, the Union Carbide spokesman quoted in the newspaper article attached to the Petition, did not remember ever hearing of Carl Lamb before being advised of the filing of the complaint in this action. As is obvious from the article, at the time Mr. Epps made the statements referred to in the article, he was not referring to Lamb.

Lamb initiated this action in the United States District Court for the Southern District of West Virginia. His complaint alleged three counts: tortious interference with his contract with MTI by James Bowyer, the Union Carbide manager who allegedly orchestrated Mabie's hire; libel arising out of certain general statements made by Thad Epps, a Union Carbide spokesman which were quoted in a newspaper article printed in the local paper; and slander arising out of statements Mabie allegedly made about Lamb's work.

Lamb's complaint was referred to United States Magistrate Judge Jerry D. Hogg for resolution of discovery disputes and a report and recommendation concerning Union Carbide's motion for summary judgment. The magistrate allowed Lamb to designate what discovery he would need from Union Carbide to respond to the pending summary judgment motion. After receiving the requested discovery, Lamb filed his response. After holding a hearing and considering the briefs, the magistrate filed a report-recommendation recommending Union Carbide's motion for summary judgment be granted. This report-recommendation is attached to this response at App. 1. Thereafter, Lamb filed objections. The district court, Chief Judge Charles H. Haden, II, adopted the report-recommendation and dismissed Lamb's complaint. Lamb's appeal to the United States Court of Appeals for the Fourth Circuit was rejected in an unpublished per curium opinion adopting the reasoning of the court below. Thereafter, Lamb unsuccessfully sought rehearing and rehearing in banc in the fourth circuit and now petitions this Court.

ARGUMENT

I. NO ISSUE WORTHY OF THIS COURT'S REVIEW ON CERTIORARI IS PRESENTED BY THE CIRCUIT COURT'S UNPUBLISHED PER CURIUM AFFIRMANCE OF THE DISTRICT COURT'S GRANT OF SUMMARY JUDGMENT.

Petitioner argues that the decision below is worthy of this Court's review based upon a supposed conflict both with decisions of this Court and with a decision of

another circuit. Even assuming that these contentions are correct, which they are not, no questions are presented by the petition that are worthy of this Court's review. This Court's Rule 10.1 provides that "[a] petition for a writ of certiorari will be granted only when there are special and important reasons therefor." This Court's scarce resources should be reserved for cases with implications "beyond the facts and parties involved." *Boag v. MacDougall*, 454 U.S. 364, 368, 102 S.Ct. 700, 702, 70 L.Ed.2d 551 (1982) (Rehnquist, J., dissenting).

The decision appealed from does not represent a conflict in the circuits necessitating this Court's attention. The opinion below is an unpublished per curium affirmance. On its face the opinion discloses that, by court rule, it is not binding precedent. Petition at A5. Moreover, the circuit court opinion affirms an unpublished district court opinion adopting an unpublished report-recommendation from the magistrate. These opinions are likely to remain unknown to anyone outside the parties involved. Finally, the opinion with which this opinion allegedly conflicts involves the application of another state's laws.

While couched in constitutional terms and littered with allegations that this Court's precedents were ignored, the Petition merely argues that the well-settled standards applicable to a determination of whether summary judgment is appropriate, *see Celotex Corp. v. Catrett*, 477 U.S. 317 (1986) and *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986), were misapplied by the courts below. Those types of errors are to be corrected in the courts of appeals. As Justice Stevens noted in his concurring opinion in *Watt v. Alaska*, 451 U.S. 259, 275 (1981):

> The federal judicial system is undergoing profound changes. Among the most significant is the increase in the importance of our courts of appeals. Today they are in truth the courts of last resort for almost all federal litigation. Like other courts of last resort – including this one – they occasionally render decisions that will not withstand the test of time. No judicial system is perfect and no appellate structure can entirely eliminate judicial error. Most certainly, this Court does not sit primarily to correct what we perceive to be mistakes committed by other tribunals. Although our work is often accorded special respect because of its finality, we possess no judicial monopoly on either finality or respect.

See also Ross v. Moffitt, 417 U.S. 600, 616-17 (1974) (Court does not exercise certiorari power merely to review perceived error in applying well-settled rules); *United States v. Johnston*, 268 U.S. 220 (1925) (Court does not grant certiorari to review evidence and discuss specific facts).

Nothing special or important is presented by Lamb's petition.

II. THE CIRCUIT COURT'S AFFIRMANCE OF THE GRANT OF SUMMARY JUDGMENT WAS CORRECT AS PETITIONER FAILED TO SHOW THAT THERE WERE ANY DISPUTED ISSUES OF MATERIAL FACT PRECLUDING SUMMARY JUDGMENT.

A. Contractual Interference

Lamb's allegations of contractual interference stem from his mistaken belief that James Bowyer, acting on

behalf of Union Carbide, hired Norman Mabie in order to facilitate intentionally transferring all the HVAC work away from Lamb's internal work group to Mr. Mabie's work group. From this incorrect factual allegation, Lamb jumps to the equally erroneous legal conclusion that these actions constituted interference with his contract with MTI.

As is evident from the affidavits filed below, Union Carbide canceled its request for an HVAC engineer because it determined that it no longer needed one. Mr. Mabie, on the other hand, was hired to perform general engineering projects. Indeed, at the time of the motion, Mr. Mabie had worked on only one HVAC project. These are facts that are not in dispute. Lamb's imagined allegations of plot by Mr. Bowyer are simply untrue.

Even if one assumes that the allegations are true, they fail to state a claim for interference with contract. Lamb's attempt to claim interference by Union Carbide with his contract with MTI must fail as he cannot allege or prove a prima facie case of interference.

> To establish prima facie proof of tortious interference, a plaintiff must show: (1) existence of a contractual or business relationship or expectancy; (2) an intentional act of interference by a party outside that relationship or expectancy; (3) proof that the interference caused the harm sustained; and (4) damages.

C.W. Development, Inc. v. Structures, Inc. of West Virginia, 185 W.Va. 462, 408 S.E.2d 41, 42 (1991). In this case the courts below correctly determined that Lamb cannot, as a matter of law, meet the second requirement.

The conduct alleged by Lamb does not constitute interference. The propriety of the alleged interference is determined by "examining the factual situation." *C.W. Development*, 185 W.Va. 462, 408 S.E.2d at 44; *see also Torbett v. Wheeling Dollar Sav. & Trust Co.*, 173 W.Va. 210, 314 S.E.2d 166 (1983) (examining nature of actor's conduct, actor's motive, interests of the other with which the actor's conduct interferes, interests sought to be advanced by the actor, and social interests in protecting the freedom of action of the actor).

Union Carbide's conduct involved exercise of its legitimate contractual rights. Lamb's allegations, while couched in terms of interference with his contract with MTI, in reality amount to a claim that Union Carbide interfered with its own contract with MTI. Union Carbide did not fire Lamb. Rather, it exercised its contractual right to revoke a request for subcontractor services. The only contract that it is alleged that Union Carbide "interfered" with was its own, and the actions it took were permitted under the contract.

Lamb contends that the notification procedures in the contract were not followed. Even if Union Carbide informed the wrong party at MTI, Lamb has no standing to complain of this supposed breach. He presented no evidence of anyone at MTI objecting. Moreover, all Union Carbide could do was rescind its request. It could not fire Lamb. Lamb was not its employee.

West Virginia law is well established – a party to a contract cannot charge another with interfering with the contract between the two. *Shrewsbery v. National Grange Mut. Ins. Co.*, 183 W.Va. 322, 395 S.E.2d 745, 747-48 (1990). If a party cannot use a tort action to punish another for

actions that are within its rights under the contract, then a claim by stranger to the contract is most certainly deficient. This is not a suit between Union Carbide and MTI. Lamb has not chosen to sue MTI. Lamb cannot use a tort action to punish Union Carbide for actions that are within its rights under its contract with MTI. *See Shrewsbery, supra*. Thus, neither the nature of Union Carbide's conduct nor its motives were improper as the interest sought to be advanced by Union Carbide was its legitimate contractual right to terminate its request that MTI provide it with an HVAC engineer when it no longer had a need for the services.

Moreover, Lamb's complaint discloses that as an MTI employee he was terminable by MTI at will. Under these circumstances, Lamb's interest (and the social interests in protecting those interests) are limited. Under West Virginia law, employees terminable-at-will can prosecute intentional interference claims against third-parties only when the employee can show that the defendant used "improper methods." *C.W. Development*, 185 W.Va. 462, 408 S.E.2d at 44 n.3 (*citing Artist v. Virginia Intern. Terminals, Inc.*, 679 F.Supp. 587, 595 (E.D.Va. 1988), *aff'd*, 857 F.2d 977 (4th Cir.1988)). Under this test, "improper methods include means that are illegal or independently torturous, such as violations of statutes, regulations, or well recognized common-law rules." 679 F.Supp. at 595. Lamb cannot make this showing.

Even if Lamb is correct in arguing that Mr. Bowyer wanted him replaced because he was dissatisfied with Lamb's work, such an allegation is not actionable. Even if Lamb was a Union Carbide employee – which he was not – as an at-will employee he could have been dismissed

for Bowyer's alleged reasons or no reason at all. *See Resner v. Watts, Ritter, & Co.*, 73 W.Va. 342, 80 S.E. 839, 840 (1913) (indefinite term employment contract terminable at will of either party); *see also Tow v. Miners Memorial Hospital Association, Inc.*, 199 F.Supp. 926, 932 (S.D.W.Va. 1961) (whether employment contract conditioned on satisfactory performance breached by discharge was not for jury as employer is sole judge of satisfaction), *aff'd*, 305 F.2d 73 (4th Cir. 1962). Lamb's claim (as a non-employee) is even weaker. In this case, Lamb only alleged that Bowyer had improper motives. He has not shown or even alleged any conduct by Union Carbide that meets the *C.W. Development/Artist v. Virginia Intern. Terminals* standard. *At most*, Lamb alleges that Union Carbide mistreated him; the supposed factual disputes are not material and his interference claim fails as a matter of law. *See McKinney v. K Mart, Corp.*, 649 F.Supp. 1217, 1220 (S.D.W.Va. 1986) ("mistreatment alone in the employment context does not give rise to a legally cognizable claim for damages"). Finally, as MTI could remove Lamb for any reason, firing Lamb would not be a breach. Consequently, no action on the part of Union Carbide could result in inducing MTI to breach its contract with Lamb.

Because the undisputed facts establish that Lamb cannot, as a matter of law, meet the required showing of interference, the courts below correctly dismissed his claim of contractual interference.

B. Libel – The Charleston Gazette Article.

Lamb's second claim is that he was libeled by the statements made by Thad Epps, a Union Carbide spokesman, who was quoted in the August 8, 1991 article in the

Charleston Gazette attached to the Petition. From this article, and from Lamb's mistaken belief that he was replaced by Mr. Mabie, Lamb argues that a reader would conclude that *he* was replaced due to marginal performance, and therefore, that the statements are libelous.

In order to recover on a claim for libel, Lamb must allege and prove, among other things, (1) that the statements were defamatory and (2) that they referred to him. *Crump v. Beckley Newspapers, Inc.*, 173 W.Va. 699, 320 S.E.2d 70, 77 (1983). In this case, the courts below correctly determined that Lamb failed to present facts supporting the second element.

The Epps statements cannot be construed as referring to Lamb. In the statements, Mr. Epps was referring broadly to numerous unspecified employees and employees of contractors. He was not referring specifically to Lamb. Moreover, he only indicated that some of the reductions in employees and contractors would be due to performance – the remainder would be due to company needs. As the article notes, there are 3,680 Union Carbide employees in the area that the Epps statements could potentially refer to.

In this case, it is clear that the Epps statements do not identify or refer to Lamb or any other ascertained person. Moreover, it would be impossible for a reader of the statements to even ascertain that any of the statements referred to Lamb let alone the ones that Lamb alleges are defamatory. Under these circumstances, Lamb's allegations are insufficient to support a claim for libel.

The requirement that an allegedly defamatory statement refer to the plaintiff is firmly established. *See Crump*, 173 W.Va. 699, 320 S.E.2d at 77; *Argabright v. Jones*, 46 W.Va. 144, 32 S.E. 995 (1899). When a specific person is not identified by name it must be possible to ascertain his identity. *See Neal v. Huntington Pub. Co.*, 159 W.Va. 556, 223 S.E.2d 792, 795 (1976). Nevertheless, when, as in this case, "the class [of persons referred to] is a very large one, and there is little or nothing which applies to the particular person who brings the action, his right of recovery will generally be denied. . . . [when it cannot] be fairly inferred that persons reading the libelous writing would conclude . . . that the plaintiff was intended to be included as a member of the class." 12A Michie's Jurisprudence of Virginia and West Virginia, *Libel and Slander*, § 17 (1989 Rep. Vol.).

Lamb is not alleging – nor can he – that the statements referred to a restricted group such as a city council. *Cf. Swearingen v. Parkersburg Sentinel Co.*, 125 W.Va. 731, 26 S.E.2d 209 (1943). Nor is he alleging that the statements referred to one particular unnamed, but ascertainable, person such as "the sheriff." *Cf. Neal, supra.* Lamb mistakenly characterizes the statements as only referring to contractors at the South Charleston plant of which he was allegedly the only one laid off. The statements made in the article were much broader than Lamb characterizes them. Mr. Epps was speaking of area-wide action involving the company's 3600 local employees. Indeed, it is not even clear from the article whether the performance reference Lamb complains of applied to contractors at all.

The statements do not, as a matter of law, refer to Lamb. Consequently, the allegations based on the Epps statements were correctly dismissed by the courts below.

C. Slander – The September 10, 1991 Mabie Statements

Lamb's final claim sounds in slander and is based upon the statements allegedly made by Mr. Mabie on September 10, 1991 to Gregory A. Goff, an employee of another Union Carbide Contractor. While initially Union Carbide moved for summary judgment on the grounds that the statements were never made, Lamb's filing of the first Goff affidavit created a factual dispute regarding this issue. Union Carbide, then filed a supplement to its motion for summary judgment asserting that the slander claim should be dismissed because the allegedly slanderous statements were (1) never published and (2) subject to a qualified privilege. The district court based its dismissal of this claim on Lamb's inability to show publication and did not reach the privilege issue. Both grounds, however, support the dismissal in the courts below.

Lamb's initial Goff affidavit alleges that the statements were made by Mr. Mabie to Goff as the two were performing work on behalf of Union Carbide. In his affidavit dated January 31, 1992, Goff states that "[a]t the site, Norman J. Mabie took exception to the design of the system *we were attending*, being critical of the dampers and their operation." Petition at A13 (emphasis added). At the time, both were performing work on behalf of Union Carbide – Goff was a contractor who had been assigned to Union Carbide for six years while Mabie was an employee. *Id.*

Assuming they were actually made, the alleged Mabie statements are privileged. A qualified privilege

exists when statements are made concerning a subject in which the declarant has an interest and is limited to those who have an interest in the subject matter. *See McKinney v. K Mart, supra* (statement from one employee to store manager concerning stolen money privileged); *Mauck v. City of Martinsburg*, 167 W.Va. 332, 280 S.E.2d 216, 221 (1981) (letter from city manager to city council concerning plaintiff's firing privileged). In this case, the two workers were investigating a potential HVAC problem. One allegedly commented about the condition in which he found the site. The comment was concerning the subject matter of their work and was limited to those who had an interest in the work. As such it was privileged.

Lamb contends that the statement was not made about the subject matter of the work because the problem they were investigating was ultimately found not to exist. In his initial affidavit, however, Goff explicitly states that the statements were made concerning the "design of the [HVAC] system we were attending." Goff's later denials of this sworn testimony should be ignored as a party cannot create a disputed issue of fact by presenting affidavits contradicting prior sworn testimony. *See Rorhbough v. Wyeth Laboratories, Inc.*, 916 F.2d 970, 975 (4th Cir. 1990).

Even if Goff's second affidavit is considered, the fact that the statement was made after the two found that the problem of the air loss was somewhere else does not change the conclusion that the alleged statement was made concerning the work. An evaluation of a site condition occurring after a problem has been investigated is still concerning the subject matter of the work – especially when the comment is made at the site by men charged with investigating these problems. Similarly,

Lamb gives no reason why the fact that Goff disagreed with Mabie's alleged comments affects this analysis in the least. Because he was charged with finding the air loss, he had an "interest" in the legal sense in the subject matter of the comment even if he did not agree or was not factually interested in the alleged remark itself.

Finally, Lamb argues that the privilege can be defeated by Mabie's malice towards him. While the privilege can be defeated by a showing of malice, *Mauck v. City of Martinsburg, supra,* the plaintiff has shown no malice on the part of Mr. Mabie to him. The fact that Mabie allegedly repeated the statement when Goff indicated that he did not hear it does not show malice. *Weldy v. Piedmont Airlines, Inc.*, 985 F.2d 57 (2d Cir. 1993), relied on by Lamb is distinguishable as involving the application of New York law and as the plaintiff in *Weldy* provided concrete evidentiary support for his theory of malice.

In addition, as the district court held, the alleged statement was never published by Union Carbide. In order to prevail on a cause of action for slander, the plaintiff must come forward with evidence that the statement was published. *Moore v. American Express, Co.*, 663 F.Supp. 97 (S.D.W.Va. 1987). When allegedly defamatory statements remain entirely within those who have a legitimate business interest in the communication, no publication has occurred. *See Mutafis v. Erie Insurance Exchange,* 561 F.Supp. 192, 197 (N.D.W.Va. 1983). In *Moore*, the district court dismissed a slander claim based upon the statements that the plaintiff was "crazy" and "sick" made in a telephone conversation between two employees of the corporation. The *Moore* court found the conversation

was insufficient to constitute publication under West Virginia law as the two had not published the statement beyond the corporation. *Id.* Similarly, the *Mutafis* Court found that a memorandum noting that the plaintiff was involved in the Mafia was not published when it was discussed by claims adjusters of the defendant insurer. 561 F.Supp at 195-96.

Lamb does not challenge in this Court the district court's finding that a publication did not occur. Below, Lamb contended that the statements were published because Goff's affidavit indicates that he told Lamb that Mabie made the statement. Of course, a publication does not occur merely because the plaintiff hears the statement. *Moore, supra.* Moreover, while Lamb contended below that a third party told him of Mabie's alleged statement, the record contains no affidavits or other evidence to support this bare assertion.

Below Lamb also attempted to distinguish *Moore* on the grounds that *Moore* involved two employees while the instant case involved an employee and an employee of an independent contractor. This distinction makes not a difference. *Moore* is based upon the reasoning that intra-corporate communication to those who have a reason to be informed of the subject matter does not result in a publication. No reasonable distinction can be made between two employees and an employee and another non-employee employed by the corporation to perform its work. When two workers comment about the condition of a work site they were charged to investigate, no publication has occurred.

Simply put, there is no evidence that Mabie communicated the statement to anyone other than Goff. That communication was not a publication. As there is no dispute that the statements are privileged and that they were not published, the dismissal of the slander claims by the courts below should be affirmed.

CONCLUSION

The district court correctly concluded that Lamb's alleged factual disputes were not material. That ruling was correctly affirmed on appeal. Nothing raised by Lamb's petition alters the correctness of those rulings. Consequently, Union Carbide requests that this Court deny the Petition.

Respectfully submitted,

Union Carbide Chemicals
and Plastics Company,
formerly known as Union
Carbide Corporation

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF WEST VIRGINIA
CHARLESTON

CARL V. LAMB,

Plaintiff,

v.

CIVIL ACTION
NO. 2:91-1049

UNION CARBIDE CORPORATION,

Defendant.

REPORT-RECOMMENDATION

(Filed Apr. 17, 1992)

JERRY D. HOGG, UNITED STATES MAGISTRATE JUDGE APRIL 17, 1992

This action is brought by the Carl V. Lamb, pro se, who is a former employee of Midwest Technical, Inc. ("MTI"). On November 28, 1988, Union Carbide Corporation, the defendant, entered into a contract with MTI for the assignment of MTI employees to various Union Carbide facilities. The plaintiff was among the MTI employees assigned to Union Carbide. Lamb alleges that the actions of James Bowyer, manger of plant design services, constituted a tortious interference with his contractual relationship with MTI; that statements made by Thad Epps in a Charleston Gazette article libeled him; and that statements a Union Carbide employee made to another Union Carbide employee were slanderous. This case is presently pending on the parties' cross-motions for summary judgment filed pursuant to Rule 56 of the Federal Rules of Civil Procedure.

On February 3, 1992, this action was referred to Jerry D. Hogg, United States Magistrate Judge, who was designated to consider the pleadings and evidence and submit his proposed findings of fact and recommendation for the disposition thereof pursuant to the provisions of 28 U.S.C. 636(b)(1)(B) and the Revised Local Rules of Practice and Procedure Before United States Magistrates.

Upon consideration of the arguments presented in the briefs submitted by counsel, and for reasons stated more fully below, the undersigned recommends the defendant's motion for summary judgment be granted and, further, recommends that plaintiff's motion for summary judgment be denied.

On November 28, 1988, Union Carbide Corporation, the defendant, entered into a contract with MTI for the assignment of MTI employees to various Union Carbide facilities. The contract provided that such services were temporary. The agreement also provided that Union Carbide could terminate work or work projects to which MTI's employees were assigned at any time.

According to the Bartrug affidavit attached to defendant's Motion for Summary Judgment, pursuant to the contract, Union Carbide requested that MTI provide it an engineer to perform certain technical work for Plant Engineering at Union Carbide's South Charleston Plant consisting primarily of engineering in the area of heating, ventilation, and air conditioning ("HVAC") in an industrial setting. Pursuant to this request, MTI assigned Carl V. Lamb, one of its employees, to perform the requested work.

In mid 1991, Union Carbide apparently determined that it no longer needed MTI to provide it with an engineer to perform HVAC work according to the Bartrug affidavit. Therefore, Union Carbide notified MTI that it was terminating its request for an engineer to perform HVAC work. *Id.* Apparently, Lamb was subsequently laid off by MTI and after Union Carbide revoked its request for MTI to provide an engineer. Complaint at ¶ 8.

In the complaint, Lamb alleges that Norman J. Mabie, who was retained by Union Carbide as an engineer prior to its determination that MTI's HVAC engineer was no longer needed, was hired by James Bowyer as part of a plot to transfer HVAC work away from Lamb's internal work to Mr. Mabie's work group, the group managed by G. R. Hattiangadi. Complaint at ¶ 7.

The plaintiff made the following allegation which forms the basis for his second claim:

> On August 8, defendant published an article in the Charleston Gazette (plaintiff's Exhibit A attached) containing an innuendo 'for a person who feels his performance is marginal who feels his job is not one that is important to the overall mission of the corporation, that person might have some apprehension'. Plaintiff alleges that the article suggests that persons would be terminated for either of the two reasons stated; that persons who read the article might conclude that plaintiff's performance had been marginal; that since he was replaced, the portion of the innuendo referring to the overall mission of the corporation would not apply, leaving only marginal performance to be concluded as the reason for his termination. Plaintiff alleges that he was

> libeled by the publishing of the article and his termination on the day after.

Complaint at ¶ 9. According to his affidavit attached to defendant's Motion for Summary Judgment, Thad Epps, the Union Carbide spokesman quoted in the article, had never met or even heard of the plaintiff before being advised of the filing of the complaint in this action.

Plaintiff's third claim stated in paragraph 10 of the complaint, as amended, is:

> On the 10th day of September, 1991, on visiting the site of a control room where the plaintiff had performed services, defendant's employee, N. J. Mabie, in the course of his employment, made the following statement to a third-party, 'this must be another one of Carl Lamb's screw-ups'. This remark was untrue and was defamatory. It was made without privilege and implies that the plaintiff was incompetent. It was slander per se. This statement was made for the sole purpose of defaming the plaintiff, was not made for the purpose of protecting any interests of the defendant, nor for any other reason than causing harm to the plaintiff's reputation in his field of expertise.

The "third-party" is subsequently identified as Gregory Goff in plaintiff's supplemental pleading.

In his complaint, Lamb asserts that James Bowyer's actions constituted an interference with his contractual relationship with MTI. Lamb's allegations of contractual interference stem from his belief that James Bowyer, acting on behalf of Union Carbide, hired Norman Mabie to perform HVAC work and transfer all work from Lamb's group to Mabie's group. Plaintiff alleges that this action

was an interference in his contractual relationship with MTI and resulted in his loss of employment.

Assuming these allegations are true, they fail to state a claim for interference with contract. The plaintiff has failed to show, as a matter of law, interference with his contract.

> To establish prima facie proof of tortious interference, a plaintiff must show: (1) existence of a contractual or business relationship or expectancy; (2) an intentional act of interference by a party outside that relationship or expectancy; (3) proof that the interference caused the harm sustained; and (4) damages.

C.W. Development, Inc. v. Structures, Inc. of West Virginia, 408 S.E.2d 41, 43 (W.Va. 1991). Clearly, Lamb cannot meet either of the second or third requirements.

First, the conduct alleged by Lamb does not constitute interference. The Supreme Court of Appeals has reviewed the factors listed in the Restatement (Second) of Torts, § 767. *Id.* In *Torbett v. Wheeling Dollar Sav. & Trust Co.*, 314 S.E.2d 166 (W.Va. 1983), the Court described the Restatement factors:

> In determining whether an actor's conduct in intentionally interfering with a contract or a prospective contractual relation of another is improper or not, consideration is given to the following factors: (a) the nature of the actor's conduct, (b) the actor's motive, (c) the interests of the other with which the actor's conduct interferes, (d) the interests sought to be advanced by the actor, (e) the social interests in protecting the freedom of action of the actor and the contractual interests of the other, (f) the

> proximity or remoteness of the actor's conduct to the interference and (g) the relations between the parties.

Id. at 172 n. 12.

Review of Union Carbide's actions, in relation to these factors, reveals that there was no improper interference. Union Carbide merely exercised its legitimate contractual rights. The contract provided under Article VI that "the Owner [Union Carbide] may terminate work or work projects to which Contractor's [MTI] employees are assigned at any time and without restriction and Contractor shall increase or decrease, as requested by Owner, the number of its employees assigned hereunder." Contract, Exhibit 1 to defendant's Motion for Summary Judgment at p. 3. The fact is, the plaintiff was an employee of MTI and was apparently terminated by MTI. However, in light of the language in the Contract, Union Carbide simply exercised its contractual right to revoke a request for subcontractor services. There is no allegation that Union Carbide had any responsibility or connection in the separation of Lamb from MTI. Although plaintiff stated in paragraph 8 of his complaint that the actions of J. A. Bowyer were the "proximate cause of his loss of employment," Lamb has not made a causal relationship between the actions of Bowyer and the contractual relationship between Lamb and MTI. As the defendant points out, the only contract that Union Carbide allegedly "interfered" with was its own. And the actions Union Carbide took were permitted under the contract.

The defendant further notes that it is well established in this state that one party cannot charge another with interfering with the contract between the two:

> It is impossible for one party to a contract to maintain against the other party to the contract a claim for tortious interference with the parties' own contract. Neither party is a stranger to the contract. Each party has agreed to be bound by the terms of the contract itself, and may not thereafter use a tort action to punish the other party for actions that are within its right under the contract.

Shrewsbery v. National Grange Mut. Ins. Co., 395 S.E.2d 745, 747-48 (W.Va. 1990). In other words, a party to a contract cannot bring an action for tortious interference. In the same vein, a non-party to a contract cannot maintain a claim for tortious interference against a party to a contract to which the non-party is not a part. Accordingly, Lamb cannot use a tort action to punish Union Carbide for actions that are within its rights under its contract with MTI. *See Shrewsbery, supra.*

The plaintiff takes issue with the concept in *Shrewsbery* that a non-party cannot bring an action to punish another for actions that are within its rights under the contract. However, it is simply not enough that, as he states, "defendant harmed him in his contractual relations and economic expectations." Plaintiff's Response to Defendant's Motion for Summary Judgment; Plaintiff's Motion for Partial Summary Judgment on Issue of Liability, p. 5. As the defendant succinctly states, neither the nature of Union Carbide's conduct nor its motives was improper as the interest sought to be advanced by Union Carbide was its legitimate contractual right to terminate its request that MTI provide it with an HVAC engineer when it no longer had a need for the services, when considered in the context of the Restatement factors.

Finally, the Supreme Court of Appeals of West Virginia has recognized that employees terminable-at-will can prosecute intentional interference claims against third-parties only when the employee can show that the defendant used "improper methods." *C.W. Development*, 408 S.E.2d at 44 n. 3 (*citing Artist v. Virginia Intern. Terminals, Inc.*, 679 F.Supp. 587, 595 (E.D.Va. 1988), *aff'd*, 857 F.2d 977 (4th Cir. 1988)). The Court in *Virginia Intern. Terminals* explained:

> Clearly, as discussed above, this employment contract, having no definite term, is terminable-at-will. While interference with such a contract may provide the basis of an action for tortious interference, the extent of permissible third-party interference increases as the degree of enforceability of a business relationship decreases. Consequently, *when a contract is terminable at will*, a plaintiff, in order to present a prima facia case of tortious interference, must allege and prove not only an *intentional* interference that caused the termination of the at-will contract, but also that the defendant employed *improper* methods. Such improper methods include means that are illegal or independently tortious, such as violations of statutes, regulations, or well recognized common-law rules. *Id.*

679 F.Supp. at 595 (emphasis in original; citations and internal quotations omitted). Plaintiff has not alleged that Bowyer acted to intentionally interfere with Lamb's contract with MTI. Further, Lamb has not alleged any illegal or independently tortious actions on the part of Bowyer or any other Union Carbide employee to interfere with his employment agreement with MTI.

Because the plaintiff has not alleged facts which constitute interference, Lamb cannot meet the third element listed in *C.W. Development* as he cannot show that Union Carbide's actions caused his alleged damages. The plaintiff has not alleged any act on the part of Union Carbide which constitutes an act of intentional interference. Even if Lamb's allegation that Bowyer transferred the HVAC work away from Lamb's work group, the plaintiff has not stated how this constitutes tortious interference. Therefore, damages cannot accrue from an interference which never occurred.

Plaintiff's second claim is that he was libeled by the statements made by Thad Epps, a Union Carbide spokesman, who was quoted in an article in the Charleston Gazette on August 8, 1991. Exhibit A to Complaint. Based on his belief that he was replaced by Mabie, plaintiff alleges in paragraph 9 of his complaint that a reader would conclude that he was replaced due to marginal performance and, therefore, the statements are libelous. In order to recover on a claim for libel, Lamb must allege and prove, among other things, (1) that the statements were defamatory and (2) that they referred to him. *Crump v. Beckley Newspapers,* 320 S.E.2d 70, 77 (W.Va. 1984). Lamb cannot meet the burden of proof required to establish his claim.

The quotations attributed to Mr. Epps cannot be considered defamatory with respect to the plaintiff. Notably, the plaintiff is never mentioned by name, title, or job description in the article, which is attached to the complaint. A defamatory statement is one that "tends to harm the reputation of another so that to lower him in the estimations of the community or to deter their persons

from associating or dealing with him. *Id.* (quoting Restatement) (Second) (Statement of Torts § 559). Further, the allegedly defamatory statement must refer to the plaintiff. *See Crump,* 320 S.E.2d at 77; *Argabright v. Jones,* 32 S.E. 995 (W.Va. 1899). When a specific person is not identified by name it must be possible to ascertain his identity. *See Neal v. Huntington Pub. Co.,* 233 S.E.2d 792, 795 (W.Va. 1976).

Clearly, the statement made by Epps does not identify or refer to Lamb. Even if the statement regarding termination could be considered damaging to an individual's reputation, there is no specific or even general reference to Lamb. Accordingly, the undersigned must conclude that Lamb's assertion that a reader of the statements would ascertain that the statements referred to him is unfounded. Therefore, Lamb's claim of libel must fail.

Finally, the plaintiff's third claim is based upon statements allegedly made by Mr. Mabie on September 10, 1991, to Gregory Goff. According to Mabie's affidavit, he never made the slanderous statement nor made any criticism of Lamb's work to any person. In his affidavit, attached to Plaintiff's Response to Defendant's Motion for Summary Judgment, Goff testified that Mabie did make such statement in his presence. Even if the statement was made, it does not constitute actionable slander as the statement was not published. Allegedly, the statement was made by Mabie to Goff, both agents of Union Carbide. As Goff's affidavit establishes that both were acting within their agency as they were investigating HVAC problems. As such, the communication was made between agents of the corporation and was within the scope of their agency. Consequently, the statement was

not published. *See Moore v. American Express Co.*, 663 F.Supp. 97 (S.D.W.Va. 1987) (dismissing slander claim when reference to plaintiff as "crazy" and "sick" made by one agent of the corporation to another holding that no publication occurred.). As the plaintiff has not alleged a cause of action for slander, it is the recommendation of the undersigned that this claim should also be dismissed.

Accordingly, for the reasons stated above, it is

RECOMMENDED that defendant's motion for summary judgment be granted, plaintiff's motion for summary judgment be denied, and this case be dismissed.

Plaintiff and defendant are hereby notified that a copy of this **REPORT-RECOMMENDATION** will be submitted by the Clerk to the Honorable Charles H. Haden II, Chief Judge, and that, in accordance with the provisions of Rule 72(b), Federal Rules of Civil Procedure, the parties may, within 13 days of the date of filing of this **REPORT-RECOMMENDATION** serve and file written objections with the Clerk of this court, identifying the portions of the **REPORT-RECOMMENDATION** to which objection is made and the basis for such objections. The Judge will make a *de novo* determination of those portions of the **REPORT-RECOMMENDATION** to which objection is made in accordance with the provisions of 28 U.S.C. 636(b) and the parties are advised that failure to file timely objections will result in a waiver of their right to appeal from a judgment of the district court based on such **REPORT-RECOMMENDATION**. Copies of objections shall be served on all parties with copies of the same to Judge Haden and this Magistrate Judge.

The Clerk is directed to file this **REPORT-RECOMMENDATION** and mail a copy of the same to the plaintiff and to counsel of record.

ENTER: April 17, 1992.

/s/ Jerry D. Hogg
JERRY D. HOGG
UNITED STATES
MAGISTRATE JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA

CARL V. LAMB,

Plaintiff,

v. CIVIL ACTION NO. 2-91-1049

UNION CARBIDE CORPORATION,

Defendant.

AFFIDAVIT

STATE OF WEST VIRGINIA,

COUNTY OF KANAWHA, to-wit:

This day personally appeared before me the undersigned authority, Barbara J. Toler, who being by me first duly sworn on her oath, deposes and says as follows:

1. That I am a Purchasing Agent for Union Carbide Chemicals and Plastics Company Inc., formerly known as Union Carbide Corporation ("Union Carbide").

2. That I have personal knowledge of the statements made in this affidavit.

3. That on November 28, 1988 Union Carbide entered into a contract with Midwest Technical, Inc. ("MTI") for the temporary assignment of MTI employees in various classifications under the terms of that contract; that contract provided, among other things, the following provision:

> Owner [Union Carbide Corporation] expressly reserves the right to enter into contracts with other contractors for the same or similar services. It is understood and agreed between the

parties hereto that owner does not guarantee to Contractor [MTI] any specific amount or days of work to be performed by Contractor under this agreement. It is understood that Owner may designate or not designate work projects to be performed by Contractor, or may terminate work or work projects to which Contractor's employees are assigned at any time and without restriction and Contractor shall increase or decrease, as requested by Owner, the number of its employees assigned hereunder.

4. That pursuant to this contract between Union Carbide Corporation and MTI, MTI made a temporary assignment of its employee, Carl Lamb, to provide certain technical services.

5. That the contract further provided:

Article 1 – Scope of Services

(a) Through the temporary assignment of its own employees in the classifications set forth in EXHIBIT "A" entitled "JOB CLASSIFICATIONS AND RANGES OF RATES FOR TEMPORARY TECHNICAL PERSONNEL", attached hereto and made a part of this Agreement, Contractor shall provide to Owner, as requested by Owner from time to time during the term of this Agreement, the services hereinafter called the "Work".

Further this affiant saith not.

/s/ Barbara J. Toler
Barbara J. Toler

The foregoing instrument was acknowledged before me this 8th day of January, 1992, by Barbara J. Toler.

My commission expires March 20, 2001.

[SEAL]

/s/ Janice S. Marsh
Notary Public

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA

CARL V. LAMB,

Plaintiff,

v. CIVIL ACTION NO. 2-91-1049

UNION CARBIDE CORPORATION,

Defendant.

AFFIDAVIT

STATE OF WEST VIRGINIA,

COUNTY OF KANAWHA, to-wit:

This day personally appeared before me the undersigned authority, E. M. Bartrug, Jr., who being by me first duly sworn on his oath, deposes and says as follows:

1. That I am the Manager, Plant Engineering, of the South Charleston Plant, Union Carbide Chemicals, and Plastics Company Inc., formerly known as Union Carbide Corporation ("Union Carbide").

2. That I have personal knowledge of the statements made in this affidavit.

3. That pursuant to the contract between Midwest Technical, Inc. ("MTI") and Union Carbide, Union Carbide requested that MTI provide it an engineer to perform certain technical work for Plant Engineering at the South Charleston Plant consisting primarily of engineering in the area of heating, ventilation and air conditioning ("HVAC") in an industrial setting.

4. That pursuant to this request, MTI assigned Carl V. Lamb, one of its employees, to perform the requested work.

5. That by mid 1991 the amount of HVAC work needed to be performed had decreased sharply. As a result, it was determined that Union Carbide no longer needed MTI to provide it with an engineer to perform HVAC work. Therefore, pursuant to the contract between Union Carbide and MTI, Union Carbide notified MTI that it was terminating its request for an engineer to perform HVAC work.

6. That prior to this determination, Norman J. Mabie was hired as an employee of Union Carbide as an engineer. Although Mr. Mabie does have some HVAC background and may undertake some of the little HVAC work that now needs to be done, Mr. Mabie was not hired to replace Carl Lamb and in fact works for a different internal Group than that for which Mr. Lamb performed his services.

Further this affiant saith not.

/s/ Edwin M. Bartrug, Jr.
E. M. Bartrug, Jr.

The foregoing instrument was acknowledged before me this 8th day of January, 1992, by E. M. Bartrug, Jr.

My commission expires March 20, 2001.

[SEAL]

/s/ Janice S. Marsh
Notary Public

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA

CARL V. LAMB,

Plaintiff,

v. CIVIL ACTION NO. 2-91-1049

UNION CARBIDE CORPORATION,

Defendant.

AFFIDAVIT

STATE OF WEST VIRGINIA,

COUNTY OF KANAWHA, to-wit:

This day personally appeared before me the undersigned authority, James A. Bowyer, who being by me first duly sworn on his oath, deposes and says as follows:

1. That I am the manager, project design services, of the South Charleston Plant, Union Carbide Chemical and Plastics Company, Inc., formerly known as Union Carbide Corporation ("Union Carbide").

2. That I have personal knowledge of the statements made in this affidavit.

3. That I have reviewed paragraph 6 of the Complaint filed by Carl V. Lamb, the plaintiff in this action, and I neither – in 1989 or at any other time – threatened to replace Carl Lamb or state to any third party that I was going to get Carl Lamb.

4. That Norman J. Mabie was hired as a general purpose mechanical engineer and placed in the work group supervised by G. R. Hattiangadi. He was not hired

in order to facilitate the transfer of all the heating, ventilation and air conditioning ("HVAC") work away from the work group managed by A. B. Williamson, as alleged in paragraph 7 of the plaintiff's Complaint.

5. That the implication in paragraph 7 of the plaintiff's Complaint that I transferred all HVAC work away from the work group managed by A. B. Williamson to the work group managed by G. R. Hattiangadi is untrue. In mid-1991 the amount of HVAC work that needed to be performed at the South Charleston Plant had decreased sharply. Consequently, although Norman Mabie was hired in order to perform general mechanical engineering tasks, Union Carbide was aware that Mabie had some background in HVAC work, and it was determined that the minimal remaining HVAC work could be performed by Normal Mabie in addition to his mechanical engineering duties.

6. That as of this date Norman Mabie has only worked on one HVAC project.

Further this affiant saith not.

/s/ James A. Bowyer
James A. Bowyer

The foregoing instrument was acknowledged before me this 8th day of January, 1992, by James A. Bowyer.

My commission expires March 20, 2001.

[SEAL]

/s/ Janice S. Marsh
Notary Public

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA

CARL V. LAMB,

Plaintiff,

v. CIVIL ACTION NO. 2-91-1049

UNION CARBIDE CORPORATION,

Defendant.

AFFIDAVIT

STATE OF WEST VIRGINIA,

COUNTY OF KANAWHA, to-wit:

This day personally appeared before me the undersigned authority, Thad Epps, who being by me first duly sworn on his oath, deposes and says as follows:

1. That I am a Spokesman for Union Carbide Chemicals and Plastics Company, Inc., formerly known as Union Carbide Corporation ("Union Carbide").

2. That I have personal knowledge of the statements made in this affidavit.

3. That I have reviewed plaintiff's EXHIBIT "A" attached to the Complaint in the above-styled civil action.

4. That I have never heard of Carl Lamb before being advised of the filing of the above-styled civil action by Union Carbide's attorneys. At the time I made the statements referred to in plaintiff's EXHIBIT "A", I was not referring to Carl Lamb.

Further this affiant saith not.

/s/ Thad D. Epps
Thad Epps

The foregoing instrument was acknowledged before me this 7th day of January, 199_, by Thad Epps.

My commission expires June 8, 1998.

[SEAL]

/s/ Lesley A. Burriss
Notary Public

Supreme Court, U.S.
FILED
MAY 12 1994
OFFICE OF THE CLERK

(3)

No. 93-1557

IN THE

Supreme Court of the United States

October Term, 1993

CARL V. LAMB,

Petitioner,

vs.

UNION CARBIDE CORPORATION,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITIONER'S REPLY BRIEF

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IN THE

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October Term, 1993

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CARL V. LAMB,

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UNION CARBIDE CORPORATION,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITIONER'S REPLY BRIEF

Respondent argues to this Court that it should *affirm the denial of Petitioner's Constitutional right* because the denial was by an unpublished per curiam affirmance and therefore not many people will know about it. This Court was presented with a somewhat similar situation in *Boag v. MacDougall*, 454 U.S. 364, 102 S.Ct. 700, 70 L.Ed.2d 551 (1982) and decided the case by Granting Certiorari and remanding the case for Trial.

I. The Court Should Grant The Petition. To Do Otherwise Would Narrow The Constitution By Failing To Preserve Its Provisions.

Respondent argues that the decision of the Appeals Court for The Fourth Circuit is not in conflict with the decision of the Appeals Court for The Second Circuit in *Weldy v. Piedmont Airlines,* 985 F.2d 57 (2nd Cir. 1993) and then argues that the plaintiff in Weldy provided concrete evidentiary support for his theory of malice, implying that petitioner has not. Weldy was allowed to present his case to a jury, before the court decided the case on a Motion for a directed verdict. Petitioner has not had that opportunity. Respondent then argues that another states law is involved in Weldy. Petitioner sees no significant difference between New York Law and West Virginia Law on this issue.

Mr. Mabie's malice is indicated by his denial, under oath, that he made any statement at all. Mabie's affidavit is attached to this reply as an Appendix at page A1. The lack of good faith and belief in the truth of the statement, in order to be protected by the qualified privilege, are obvious. Petitioner can find no case where the defense of qualified privilege has been allowed to defeat a plaintiff where the making of the statement has been denied. "In every case where a communication would otherwise be privileged, falsehood and the absence of probable cause will amount to proof of malice." *White v. Nichols,* 3 How. 266 11 L.Ed. 591 (1845). Petitioner made the Fourth Circuit Appeals Court aware of the ruling in Weldy prior to that Court reaching it's Decision and cannot now help but wonder why The Fourth Circuit did not address the issue.

If this Court, aware of the conflict of genuine material facts that are for a jury, follows the reasoning advanced by the Respondent for denying Certiorari, it will act contrary to previous pronouncements of the Court. This Court in *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 257 (1986), made it clear that in order to defeat Summary Judgment, a plaintiff need only present evidence from which a Jury might return a verdict in his favor. If he does so, there is a genuine issue of fact that requires a trial.

Respondent alleges that Petitioner's petition contains numerous factual allegations that are unsupported by affidavits, or not argued in the Courts below, *but fails to name any whatsoever.*

In its statement of the case, Respondent misstates the case with respect to the Magistrate's actions. The facts *are* that when Respondent motioned for Summary Judgment and simultaneously to quash Petitioner's discovery, the Magistrate quashed Petitioner's interrogatories, allowing Petitioner the answers to two questions, *altered* the record of the hearing to *erase* the comments wherein he made clear to Petitioner that he was not going to get any discovery and simultaneously *erased* certain of Petitioner's statements, *allowed* the Respondent to file a supplemental pleading to support its Motion for Summary Judgment, *instructed* the Respondent to draw the Court's Order relating to the discovery, which was then issued without giving the Petitioner an opportunity to review the agreed discovery wording and denied Petitioner's Motion to correct the inaccurate wording. Petitioner filed his response to Respondent's Motion for Summary Judgment *prior* to discovery. Petitioner filed his answer to Respondent's Supplemental pleading *after* discovery. The hearing was

devoted primarily to the discovery issue, and lasted only 30 minutes. *No hearing* was held following discovery. Subsequently, the Magistrate copied Respondent's pleadings and affidavits and issued them as his report. The Magistrate's report does not contain a single conclusion that has not been copied from the pleadings of the Defendant. Not a single law case has been cited that was not copied from the Defendant. The Magistrate's conclusions, regarding whether or not Mabie's slander was published, assume that an occasion of qualified privilege cannot be abused, which is contrary to established principles of law and has been answered in Petitioner's Petition. The Magistrate's conclusions regarding the testimony of Epps, that he had never heard of the Plaintiff, are answered in Petitioner's Petition. His conclusions that Petitioner did not show Bowyer's interference are incorrect. Under FRCP Rule 803(3), evidence of a statement of a declarant showing he intends to do an act, is admissible in support of an inference he did the act, providing proof of the act is relevant. *United States v. Jackson,* 579 F.2d 840 (4th Cir. 1978).

The Magistrate's report states that Lamb takes issue with the concept that a non-party cannot bring an action to punish another for actions that are within it's rights under the contract. *At no time has Petitioner ever stated or implied that he was claiming that Respondent had interferred with its own contract.* On a reduction in work, MTI, *not Union Carbide,* was to increase or decrease *the number* of its assigned employees. Therefore, when Respondent informed Petitioner that *he* was terminated, it was not acting within the terms of it's contract.

Respondent persists in erecting the straw man named Lamb who contends that Respondent interferred with its own contract, and then knocks him down. Respondent's claim that Mabie was not hired to replace Petitioner is a sham. It has not been refuted that Mabie was escorted to Petitioner on the first hour of his first day of employment and Petitioner was instructed to show him all his work. Respondent states that Petitioner argued that Bowyer wanted him replaced because he was dissatisfied with Petitioner's work. This is a contention by the Respondent, not Petitioner.

Respondent misstates Goff's Affidavits to suit its own purposes. When Goff's Affidavits support its theory of the privilege of the occasion they are accepted as true. When they destroy the privilege they are characterized as Goff's later denials. Goff's second Affidavit states that "When we got there *it was obvious* that the problem had been corrected." (Actually, Goff himself had corrected it days earlier and did not know why he was going to the site when his supervisor asked him to accompany him and Mr. Mabie). Respondent misstates Goff's Affidavit by saying that he indicated that he did not hear Mabie. Goff's statement was that he wasn't sure that he had heard him *correctly*. Mabie's statement *startled* him, so he asked "How's that?" Mabie then repeated his slanderous statement. The facts are misstated when Respondent states that Petitioner contended that he learned of the slanderous remarks from Goff. The record shows that Petitioner asked Goff *to whom* Mabie made the statement. Obviously, the statement had already gotten outside the Corporation. Had it not, Petitioner could not have known about it prior to his conversation with Goff. This is evidence. It is Goff's sworn statement. Petitioner did not contend that the statements were published *when Goff told him about them,* as Respondent has claimed.

Respondent raises the issue of the District Courts finding of lack of publication. Quoting from Prosser Chapter 19 page 798 5th ed. 1984, "There may be publication to any third person. It may be made to a member of the plaintiff's family, including his wife, or to the plaintiff's agent or employee. *It may be made to the defendant's own agent, employee or officer, even where the defendant is a corporation.*" (Italics supplied) *Fulton v. Atlantic Coast Line Railroad Co.*, 220 S.C. 287 (1951); *Bacon v. Michigan Central Railroad Co.*, 21 N.W. 324 (1884); *Kennedy v. James Butler, Inc.*, 245 N.Y. 204 (1927); *Cochran v. Sears, Roebuck & Co.*, 34 S.E.2d 296 (1945). Petitioner submits that the finding by the District Court confuses publication with privilege.

Rather than being a fact specific determination, as Respondent characterized in its QUESTION PRESENTED, the District Court's finding simply accepts the recommendation of the Magistrate, who copied his conclusions from the Respondent's Pleadings. (See Petition for Certiorari Appendix at A6). The Appeals Court affirms the findings of the District Court.

Petitioner submits that this case is a factually intensive case that is exceedingly within the province of the Jury. Not only does a controversy of genuine material fact exist, but there is a controversy involving motive, intent, credibility and bias. Petitioner's objections to the Magistrate's report alone would be more than 30 pages, when printed to the Court's requirements.

Petitioner is not asking this Court to decide this case. He is asking this Court to affirm his Constitutional right to a jury trial and remand this case to the District Court to proceed correctly, according to The Common Law.

CONCLUSION

For the reasons set forth in the Petition for Certiorari and for the reasons set forth in this Reply Brief, the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

CARL V. LAMB, *Pro Se*
P.O. Box 8612
South Charleston, WV 25303
(304) 755-3518

APPENDIX

Affidavit of Norman J. Mabie,
Dated January 8, 1992.

IN THE UNITED STATES DISTRICT COURT
FOR THE
SOUTHERN DISTRICT OF WEST VIRGINIA

CIVIL ACTION NO. 2-91-1049

CARL V. LAMB,

Plaintiff,

v.

UNION CARBIDE CORPORATION,

Defendant.

AFFIDAVIT

STATE OF WEST VIRGINIA,
COUNTY OF KANAWHA, to-wit:

This day personally appeared before me the undersigned authority, Norman J. Mabie, who being by me first duly sworn to his oath, deposes and says as follows:

1. That I am a Mechanical Engineer for Union Carbide Chemicals and Plastics Company Inc., formerly known as Union Carbide Corporation ("Union Carbide").

2. That I have personal knowledge of the statements made in this affidavit.

3. That I was hired by Union Carbide on May 28, 1991.

4. That although I have some background in heating, ventilation and air conditioning ("HVAC") work, as of this date I have only undertaken one HVAC project for Union Carbide.

5. That I have never made a statement to anyone to the effect: "This must be another one of Carl Lamb's screwups." Nor have I made any criticism of Mr. Lamb's work to any person.

Further this affiant saith not.

NORMAN J. MABIE
Norman J. Mabie

The foregoing instrument was acknowledged before me this 8th day of January, 1992 by Norman J. Mabie.
My Commission expires March 20, 2001.

JANICE S. MARSH
Notary Public

OFFICIAL SEAL
NOTARY PUBLIC STATE OF WEST VIRGINIA
JANICE S. MARSH
JACKSON & KELLY
P.O. BOX 553 CHARLESTON, WV 25322
My Commission Expires 03-20-2001